84-1234

Office-Supreme Court, U.S.
FILED
JAN 29 1985
ALEXANDER L. STEVAS,
CLERK

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

FREDDIE LEE HALL,

Respondent.

APPENDIX FOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JIM SMITH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3563

FREDDIE LEE HALL,

Petitioner-Appellant

versus

LOUIE L. WAINWRIGHT, Secretary Florida Dept. of Offender Rehabilitation; RICHARD DUGGER, Superintendent of Florida State Prison at Starke, Florida; and JIM SMITH Attorney General of the State of Florida,

Respondent-Appellees

Appeal from the United States District Court for the Middle District of Florida

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(May 16, 1984)

Before HILL and HATCHETT, Circuit Judges and ALLGOOD*, District Judge.

PER CURIAM.

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

The Appellant, Freddie Lee Hall, appeals the district court's denial of his application for federal habeas corpus relief, 28 U. S. C. A. § 2254 (West 1977).[1] We affirm in part, reverse in part, and remand.

Facts

On February 21, 1978, Freddie Lee Hall and M. C. Ruffin, decided to steal an automobile for use in robbing a convenience store. They proceeded to Leesburg, Florida, looking for an automobile, and saw Karol Lea Hurst standing beside her automobile in a parking lot outside a convenience store. Hall approached Hurst,

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[1]Title 28 U.S.C.A. § 2254(d) provides: The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

forced her into her automobile, and they drove off. Ruffin followed in his automobile. After being driven to a remote area, Hurst was raped, beaten, and murdered by a gunshot to the head from Hall's revolver.

Hall and Ruffin proceeded to another convenience store, but after purchasing a few items decided not to commit the robbery. While leaving the store, they encountered a policeman and a fight ensued. Ruffin and Hall fled the scene after murdering the policeman with his own revolver. After a chase, law enforcement officers apprehended Hall and Ruffin. Hall confessed. His confession provided the essential evidence linking him to the Hurst murder. In the confession, Hall stated that Ruffin raped and killed Karol Lea Hurst and that he (Hall) did not kill or rape Hurst. Nevertheless, the jury

convicted Hall of first degree murder as a principal to the crime, and the trial court sentenced him to death. [2]

The Supreme Court of Florida upheld Hall's conviction and sentence. [3] Subsequently, Hall filed a state habeas corpus petition pursuant to Florida Rules of Criminal Procedure 3.850. The state trial court denied Hall's motion, and the

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[2] Hall was convicted as a principal in the first degree under Fla. Stat. Ann. § 777.011, which provides:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

[3] Hall v. State, 403 So.2d 1321 (Fla. 1981).

Supreme Court of Florida affirmed. [4]

Thereafter, Hall petitioned the United States District Court for the Middle District of Florida for a writ of habeas corpus. The district court denied the writ without an evidentiary hearing.

Hall raises nine issues on appeal: (1) Hall argues that his trial was rendered fundamentally unfair in violation of the fifth and fourteenth amendments to the Constitution of the United States by the admission of evidence of collateral offenses, which became a feature of the trial rather than an incident thereto; (2) he contends the prosecution presented insufficient evidence to prove his guilt beyond a reasonable doubt; (3) he argues that the death sentence is improper because the

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[4] Hall v. State, 420 So.2d 872 (Fla. 1982).

trial court did not require a finding that he had the intent to kill; (4) Hall argues that certain prosecutorial comments during the guilt and sentencing phases of the trial violated his constitutional rights; (5) he contends that the state court's utilization of a previous conviction of first degree murder (which was eventually reduced to second degree murder) for an aggravating circumstance violated the eighth and fourteenth amendments; (6) he claims the trial court failed to weigh mitigating circumstances; (7) Hall contends his absence from the courtroom at various stages of the trial violated his due process rights and his right to confrontation under the sixth and fourteenth amendments; (8) Hall argues the trial court erred in denying him an evidentiary hearing on his ineffective

assistance of counsel claims; (9) Hall contends the federal district court erred by holding he had failed to exhaust his state remedies with respect to nineteen claims:

1. Whether Hall's Trial Was Rendered Fundamentally Unfair in Violation of the Fifth and Fourteenth Amendments by the Admission of Evidence of Collateral Offenses.

Hall contends the admission of evidence relating to the death of the police officer killed in the struggle outside the convenience store, rendered his trial fundamentally unfair. During Hall's trial, the prosecutor elicited testimony from various witnesses declaring they had seen Hall and Ruffin encounter the police officer outside the convenience store immediately preceding his death. The prosecution also introduced the bullets and revolver used to murder the officer. Hall

argues this evidence rendered his trial fundamentally unfair. The state argues that this evidence was properly admitted to show a common scheme or motive of Hall and Ruffin. The Supreme Court of Florida agreed with the state. It held that the collateral crime evidence was "admissible to prove identity (the Hurst murder weapon was found under the police officer's body) and to show the general context in which the criminal action occurred." Hall v. State, 403 So.2d 1321, 1324 (1981). The district court agreed with the state supreme court's ruling.

Federal courts possess limited authority to review state evidentiary rulings in a habeas corpus action by a state prisoner. Burgett v. Texas, 389 U.S. 109, 113--14 (1967); Nordskog v. Wainwright, 546 F.2d 69, 72 (5th Cir. 1977).

Moreover, "the general rule is that a federal court will not review a trial court's actions with respect to the admission of evidence." Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. 1982) (citing Lisenba v. California, 314 U.S. 219, 228 (1941). Before any relief concerning a state evidentiary ruling may be granted, "the violation must rise to the level of a denial of 'fundamental fairness.'" Shaw v. Boney, 695 F.2d 528, 530 (11th Cir. 1983); Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir. 1982); Bryson v. Alabama, 634 F.2d 862, 864-65 (5th Cir. 1981).

In the context of this trial, the admission of evidence relating to the police officer's murder failed to render Hall's trial fundamentally unfair. The evidence related to the identity of Hall as a

suspect in the Hurst murder. The evidence also pertained to Hall and Ruffin's common scheme and motive to commit certain crimes that day. Since the evidence was neither a critical nor a highly significant factor in the prosecution's case, we cannot say that its admission rendered Hall's trial fundamentally unfair. Shaw, 695 F.2d at 531.

2. Whether Hall was Convicted and Sentenced to Death Without Sufficient Evidence to Prove His Guilt Beyond a Reasonable Doubt.

Hall contends that insufficient evidence existed to prove beyond a reasonable doubt that he murdered Hurst. He claims, therefore, that his conviction and death sentence deny him due process and subject him to cruel and unusual punishment in violation of the fifth and fourteenth amendments. The state argues that sufficient evidence existed to convict Hall

of first degree murder.

In Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court articulated the standard for federal courts reviewing a state court conviction where the defendant contends that evidence is insufficient to prove his guilt beyond a reasonable doubt. The Court stated that the relevant question is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. See also Duncan v. Stynchombe, 704 F.2d 1213, 1214-15 (11th Cir. 1983).

To convict Hall of first degree murder, the state had to prove either that he had a "premeditated design to effect the death of the person killed," Fla. Stat. §782.041(1)(a)(1) (West Supp. 1983), or

that he was a principal in the first degree to the murder, Fla. Stat. §777.011.[5] If the jury found that Hall had a premeditated design to kill Hurst or aided and abetted Ruffin in the killing of Hurst, it was authorized to find Hall

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[5] Fla. Stat. §782.041(1)(a)(1), (2) and (3) defines murder as:

~~(1)~~(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by §893.135(1),
b. Arson,
c. Sexual battery,
d. Robbery,
e. Burglary,
f. Kidnapping,
g. Escape,
h. Aircraft piracy, or
i. Unlawful throwing, placing, or discharging of a destructive device or bomb; or

guilty of first degree murder and recommend a sentence of death.

In viewing the evidence in the light most favorable to the prosecution, we find that the evidence establishes that Hall either had a premeditated design to kill Hurst or aided and abetted in her murder. Hall abducted Hurst and drove her to the site where she was killed with his revolver. Her personal belongings were found in the automobile in which Hall attempted to escape. A rational trier of fact could

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3. Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

Freddie Lee Hall was not tried on a felony murder theory. Therefore, only section 782.041(a)(1) is applicable.

have found that Hall either intended to kill Hurst or aided and abetted in her murder. Hall's conviction and death sentence does not violate the standard enunciated in Jackson v. Virginia.

3. Whether Hall's Death Sentence is Unconstitutional Because the State has Failed to Prove Hall Had the Intent to Kill.

Citing Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Hall contends his sentence of death is unconstitutional because no proof existed that he killed or intended to kill. In Enmund, the Supreme Court held that the eighth amendment prohibits imposition of the death penalty on an individual who neither took life, attempted to take life, intended to take life, or intended to utilize lethal force. Enmund, 458 U.S. at 797, 102 S.Ct. at 3376 73 L.Ed.2d at 1151. While we do not dispute

Hall's contention that Enmund stands for the proposition that an accused may not be sentenced to death absent proof that he killed, attempted to kill, intended to kill, or intended to use lethal force, we find that evidence existed to support Hall's death sentence.

In determining whether a death sentence is unconstitutionally imposed, we must look to the individual culpability of the accused. Enmund, 458 U.S. at 799 - 01 73 L.Ed.2d at 1153 - 54; Ross v. Hopper, 716 F.2d 1528, 1529 (11th Cir. 1983). Hall's personal culpability is far more flagrant than that of the accused in Enmund. Earl Enmund drove the getaway car during a robbery at a farmhouse. He was not present at the farmhouse where the murder occurred. The record also failed to disclose that he intended to kill or

attempted to kill. Enmund, 458 U.S. at 788 - 89, 102 S.Ct. at 3372, 73 L.Ed.2d at 1145-46. At the least, Hall was present when Hurst was murdered, and he aided in her abduction. Moreover, Hall's gun was used to murder Hurst. This evidence supports a finding that Hall either took life, attempted to take life, intended to take life, or intended to utilize lethal force. [6]

Therefore, after "examining the individual culpability of the defendant, as did the Supreme Court in Enmund, we conclude that the punishment was not disproportionate in relation to Hall's participation in the crime." Ross v. Hopper, 716

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[6] Hall obtained the gun the morning of the murder. This fact supports a finding that Hall either killed, attempted to kill, intended to kill, or intended to use lethal force.

F.2d 1528, 1533 (11th Cir. 1985). See also Henry v. Wainwright, 721 F.2d 990, 995 (11th Cir. 1983).

Moreover, the trial court adequately instructed the jury that it had to find that Hall personally had the intent to kill. The court instructed as follows: "A premeditated design to kill is the fully formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing." At another place during the instructions, the court stated: "It will be sufficient proof of such premeditated design if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt of the existence of such premeditated design at the time of the homicide." (Emphasis added.)

Hall, however, contends that the Fifth Circuit decision in Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir.), rehr'g denied 697 F.2d 699 (5th Cir. 1983), is dispositive of this issue. We disagree. In Clark, Clark and another robbed a restaurant and, during the course of the robbery, murdered the assistant manager. The jury convicted Clark of first degree murder, and the court sentenced him to death. The Fifth Circuit reversed his conviction and sentence.

The Fifth Circuit looked to the overall jury charge and found that the jury was told "that they could find evidence of [Clark's intent to kill] in acts of butchery--by Glover--if the two of them had combined to commit the crime of armed robbery." Id. at 77. The jury was not compelled to determine whether Clark had the

specific intent to kill as required by the Louisiana statute. The jury instruction created a presumption that Glover's acts were intended by Clark. The Fifth Circuit, therefore, held that the jury instructions "relieved the prosecution of its burden in violation of Mullaney v. Wilbur, 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508] (1975), and cast the burden of disproving that intent upon Clark, in violation of Sandstrom v. Montana, 442 U.S. 510 [99 S.Ct. 2450, 61 L.Ed.2d 39] (1979)." Clark, 694 F.2d at 77.

This case differs from Clark. Clark was charged with first degree murder, and the jury was instructed to find the defendants guilty of any crime, including murder, committed in furtherance of the robbery, the underlying crime. It was unnecessary for the jury to find Clark had

the intent to kill to convict him of murder in the first degree. Intent was presumed. No underlying crime existed in this case by which the jury could have presumed Hall intended to kill. The jury was not instructed to find Hall guilty of first degree murder if it found the murder was committed in furtherance of another crime. The burden of proving intent to kill remained with the prosecution. Therefore, the problem present in Clark does not exist in this case.

4. Prosecutorial Remarks During the Guilt and Sentencing Phases of the Trial

A. Remarks during the Guilt Phase

Hall alleges that certain remarks by the prosecutor during the guilt phase of his trial denied him due process of law and deprived him of a reliable determination of guilt in a capital trial as

required by the sixth, eighth, and fourteenth amendments to the federal constitution. The state argues the prosecutorial remarks were proper and did not violate Hall's constitutional rights.

During his closing argument, the prosecutor referred to Hall by stating: "[T]he evidence shows us that this defendant sitting right over there, and he's asleep . . ." Hall urges us to reverse his conviction because this statement was an improper comment on his failure to testify. We disagree.

A prosecutor may not comment on a defendant's failure to testify, and it is reversible error to do so. Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965); United States v. Brown, 546 F.2d 166, 173-74 (5th Cir. 1977).

> The standard fordetermining if there has been an impermissible comment on a defendant's right to remain silent at the time of his arrest or his right not to testify at trial is whether the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.

United States v. Vera, 701 F.2d 1349, 1362 (11th Cir. 1983); United States v. Dearden, 546 F.2d 622, 625 (5th Cir.), cert. denied, 434 U.S. 902 (1977). In applying this test, the court must "look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact upon the jury." Samuels v. United States, 398 F.2d 964, 967 (5th Cir. 1968), cert. denied, 393 U.S. 1021 (1969).

The prosecutor's comment on Hall's sleeping during the trial was not a

comment on Hall's failure to testify. It was not intended to be nor was it of such a character that a jury would naturally and necessarily take it to be. Vera, 701 F.2d at 1362; Dearden, 546 F.2d at 625. The comment simply related to Hall's demeanor during the trial. Hall also contends that the prosecutor improperly commented on his failure to testify on three other occasions. [7] These statements do not comment on Hall's failure to testify.

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[7] The prosecutor stated: (1) "So what happens then? Here we come into something that's important. Who says that Ruffin killed her? I wasn't there. Karol Hurst is dead." (2) "This man admits all of it. The only thing he is not saying is, he is saying, 'I did everything, but I didn't kill her, I didn't have anything to do with that.' That's the big thing, that's the biggie, that's what he's saying." (3) "Now this is a tragic case. We have a deceased woman; she can't testify. I don't know how quick death comes to people; I know some die hard, some die easy. It comes to all of us sooner or later."

The prosecutor merely explains to the jury that Hall has confessed to all of the facts of the crime except the killing of Hurst. The jury would not take these remarks as calling attention to the failure of Hall to testify. The prosecutor, therefore, has not violated the holding in Griffin v. California.[8]

Hall also contends that another prosecutorial remark during the guilt

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[8] Our holding is supported by the curative instruction the trial court gave to the jury concerning Hall's failure to testify:

> In every criminal proceeding the defendant has the absolute right to remain silent. At no time is it the duty of a defendant to prove his innocence. From the exercise of the defendant's right to remain silent a jury is not permitted to draw any inference of guilt, and the defendant's failure to take the witness stand must not be considered in any manner an admission of guilt, nor should his failure to take the witness stand influence your verdict in any manner whatsoever.

phase was improper and prejudicial. During his closing argument, the prosecutor stated:

> I don't know; there she is, we can't bring her back, you know; I don't know much worse that you could have, I really don't know . . . now this is a tragic case. We have a deceased woman, she can't testify. I don't know how quick death comes to people; I know some die hard, . . . some die easy. It comes to all of us sooner or later.

The state argues that this remark was not prejudicial.

In reviewing a claim of prosecutorial misconduct in a habeas corpus case, we must determine "whether the prosecutor's actions [were] of such a nature as to render the trial fundamentally unfair." Donnelly v. DeChristoforo, 416 U.S. 637, 642-45, 94 S.Ct. 1868, 1871 - 72, 40 L.Ed.2d 431 (1974); Brooks v. Francis, 716 F.2d 780, 787 (11th Cir. 1983); Hance v.Zant, 696 F.2d 940, 950-51 (11th Cir.),

cert. denied, __ U.S. __, 103 S.Ct. 3544 (1983). We consider the totality of the circumstances in making this determination. Brooks, 716 F.2d at 787; Hance, 696 F.2d at 950. Applying these standards, the prosecutor's comment during the guilt phase did not reach a level which made the trial fundamentally unfair. Brooks, 716 F.2d at 788. The prosecutor was simply stating a fact; Karol Lea Hurst was dead and she could not testify. These comments are barely questionable; certainly, they are not of constitutional magnitude. Hance, 696 F.2d at 950; Houston v. Estelle, 569 F.2d 372, 377-8, n. 8 (5th Cir. 1978).[9]

[9] Hall also contends that the prosecutor on various occasions remarked about items not received into evidence. This claim lacks merit because the alleged errors do not rise to the level of constitutional magnitude. Houston, 569 F.2d at 377-78, n. 7 (1978).

B. Remark During the Penalty Phase

Hall also challenges a remark made by the prosecutor during the closing argument at the penalty phase of the trial. The prosecutor stated: "Ladies and gentlemen of the jury, with all due sincerity, I don't see any mitigation in this particular case." The sentencing phase of a capital murder trial in Florida presents a different situation than the guilt phase. In Florida, the jury has the choice of recommending a life sentence or the death penalty after finding the defendant guilty. Fla. Stat. § 921.141(2) (West Supp. 1983). While the jury's recommendation of life or death is only advisory, it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake. Brooks, 716 F.2d at 788; Hance, 696 F.2d at 951. While the

prosecutor's comment expressing his personal opinion to the jury is questionable, it is not unconstitutional. Hance, 696 F.2d at 951. The remark did not incite the passions and fears of the jury. Brooks, 716 F.2d at 788.

5. Whether the Conviction for Killing the Policeman was Improperly Utilized to Show the Aggravating Circumstances of Prior Criminal History

Hall claims that because the Supreme Court of Florida reduced his sentence for murdering the police officer from first to second degree murder, the conviction should not have been used to show the aggravating circumstances of prior criminal history. Hall v. State, 401 So.2d 1319 (Fla. 1981). Hall contends that this error deprived him of his rights under the eighth amendment to a fair and reliable determination of his penalty. The state

contends the utilization of the police officer's murder was proper to support an aggravating circumstance of prior criminal history.[10]

Hall's claim lacks merit. Under Florida law, an aggravating circumstance exists when a defendant has been "previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla. Stat. Ann. § 921.141(1)(b) (West Supp. 1983). A second degree murder conviction satisfies this standard. Therefore, the police officer's murder was properly utilized to find the aggravating circumstance of prior criminal history. Furthermore, Hall's

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[10] In Florida, a death sentence can be recommended by the jury and imposed by the trial court when aggravating circumstances exist which outweigh the mitigating circumstances. Fla. Stat. Ann. § 921.141(2), (3) (Supp. 1983)

1968 conviction for assault with intent to commit rape was before the trial court and was sufficient to support the existence of this aggravating circumstance.

6. The Trial Court's Failure to Weigh Mitigating Factors.

Hall asserts that the trial court failed to consider relevant mitigating circumstances, thereby rendering his death sentence arbitrary and capricious in violation of the eighth and fourteenth amendments.[11] Hall contents that his testimony during the sentencing phase of the trial was sufficient to prove the mitigating circumstances of diminished capacity to appreciate the criminality of his conduct and under influence of extreme

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[11] Fla. Stat. Ann. § 921.141(6) (West Supp. 1983) provides seven mitigating circumstances to the jury to consider:

(6) Mitigating circumstances, --

emotional disturbance.[12] Fla. Stat.

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mitigating circumstances shall be following:

(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committd by another person ad his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

The jury, however, is not limited to these enumerated factors, and may consider any evidence in mitigation it deems relevant. Lockett v. Ohio, 438 U.S. 586 (1978). See also Eddings v. Oklahoma, 455 U.S. 104 (1982).

[12] During the sentencing hearing, Hall stated, "I was high when this taken place, I wasn't drunk. I was high, and I'm sorry to say I really don't want no one to get killed in this case, but it happened that way. I'm sorry it happened that way."

Ann. §921.141(4)(6)(b), (f) (West Supp. 1983. We disagree.

The evidence presented by Hall was insufficient to compel the trial court to find the existence of a mitigating circumstance. While the sentencer must consider all evidence presented in mitigation, he also determines the weight to be given to evidence of relevant mitigating circumstances. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). In the present case, we cannot conclude that the sentencer erred in holding that Hall's proffered evidence was insufficient to establish these mitigating circumstances.

(7) Hall's Absence From Various Stages of His Trial

Hall urges that his due process rights and his right to confrontation were violated by his absence during (1) the general qualification of jurors; (2) a

discussion on various legal motions; (3) his counsel's stipulation to the excusal of an alternate juror; (4) the marking for identification of an exhibit; (5) the release of the remaining alternate jurors at the end of the guilt phase; (6) the trial court's discussion with the jury concerning their request for certain items of evidence during deliberation; and (7) the trial judge's dismissal of the jury. The state contends that Hall was present at all critical stages of the trial, and therefore, his absence did not violate any of his rights. Agreeing with the state, the district court held that Hall was not absent from any critical stages of the trial, and that Hall had waived his right to be present at the various stages of his trial.

"[A]n accused has [the] right to be

present at all stages of the trial where his absence might frustrate the fairness of the proceedings." Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 525, 2533 n. 15, 45 L.Ed.2d 562 (1975); Snyder v. Massachusetts, 291 U.S. 97, 105-08, 54 S.Ct. 330, 332 - 33, 78 L.Ed. 674 (1934); United States v. Stratton, 349 F.2d 1066, 1080 (5th Cir. 1981). In this case, the district court determined that Hall's absence from the various stages of the trial did not violate his due process rights.

We are concerned about two matters: (1) the circumstances surrounding Hall's absence during the trial court's discussion with the jury concerning items of evidence during the jury's deliberations, and (2) the effect of our recent holding that a defendant may not waive his presence in a capital case announced in Proffitt v. Wainwright, 685 F.2d 1227, 1256-58

(11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983), cert. denied, __ U.S. ___, 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698.[13] Precedent in this circuit suggests that Hall's absence during discussions with the jury may constitute error. United States v. Benavides, 549 F.2d 392 (5th Cir. 1977). We read Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial.

This record requires further development for a determination of (1) why Hall was absent during communications with the jury, (2) what was communicated to the jury, and why, (3) whether Hall knowingly and willingly waived his right to be

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[13]Hall contends that he may not waive his presence in a capital case, and therefore, his absence violated his due process rights.

present, (4) was Hall removed from the courtroom because of misconduct, (5) what "security" reason caused Hall to be absent from the trial at one point, and (6) whether Hall's absence was at a non-critical stage of the trial and, therefore, harmless. The only thing in the record to show anything regarding Hall's absence is his lawyer's statement (also made in Hall's absence) that, "I think the record ought to reflect that I personally talked to my client before we picked the twelve trial jurors and asked if he had any problem with it. He made the statement whatever I want to do is fine, that I was to run the show."

(8) The Federal District Court's Denial of a Hearing on Hall's Ineffective Assistance of Counsel Claim.

The federal district court decided Hall's ineffective assistance of counsel

claim without holding an evidentiary hearing. Hall v. Wainwright, 565 F. Supp. 1222, 1240-42 (M.D. Fla. 1983). It adopted the state court's ruling after holding that Hall had deliberately bypassed his opportunity for an evidentiary hearing on his ineffective assistance of counsel claim in state court. Id. at 1241. The district court based the decision of deliberate bypass on one sentence Hall's counsel uttered in the rule 3.850 hearing.[14] This sentence was sufficient evidence for the district court to conclude that Hall had deliberately bypassed his opportunity to produce evidence in the rule 3.850 hearing.

While Hall's counsel did state that he did not want to put on evidence as a

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[14] Hall's counsel stated, "I choose to [not put on any testimony] as a matter of tactics at this time."

matter of tactics, there are other statements in the record which show that Hall's counsel's decision not to put on evidence was not a tactical decision, but a decision compelled by the exigencies of the circumstances.

On September 20, 1982, the trial court ordered the public defender to confer with Freddie Lee Hall and advise him of his rights under Florida Rule of Criminal Procedure 3.850. The trial court also ordered the public defender to file all motions under rule 3.850 by September 27. The court extended this deadline to 9 a.m., September 28. Hall was scheduled to be electrocuted on October 6, 1982. Consequently, the public defender had seven days to confer with his client, advise him of his rights, prepare pleadings, prepare a strategy for the hearing, interview

witnesses, and obtain information for the hearing.[15] Throughout the state habeas corpus hearing, Hall's attorney argued that he was unprepared to proffer any evidence because of the stringent time limitations.

During the rule 3.850 hearing, Hall's counsel had incorporated a motion for continuance into his motion to vacate and set aside the sentence. During the argument concerning the motion for continuance, Hall's attorney stated, "[t]his is not a ploy to postpone ultimate judgment on Mr. Hall." During the rule 3.850 motion hearing, Hall's attorney stated that "[he] was not prepared at this time to call witnesses. I'm not adequately prepared to examine or cross-examine any witnesses with

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[15] The public defender first conferred with Hall on September 21.

regard to the allegations in the motion." Hall's attorney alsostated, "We are not prepared to conduct an evidentiary hearing." Concerning Hall's attorney's decision not to put Hall's trial attorney on the stand, Hall's attorney stated:

> With regard to Mr. Brown's assertion that what we are seeking is the truth here, we certainly concur in that, Your Honor. The point is Mr. Brown is too good of a trial counsel -- and I've seen and witnessed and been against him in too many cases -- to know that Mr. Brown would suggest to the Court, in a situation this serious, I put a witness on the stand, not having been able to fully explore how he's going to answer my questions and start asking open-ended questions. He doesn't do that at trial. I don't do that at trial, and I don't intend to do it here.

These statements support Hall's contention that his lawyers were not prepared to conduct a rule 3.850 motion, and therefore, produced no evidence at the

hearing.[16]

Unless it is clearly shown on the record that a deliberate bypass has occurred, a federal court must hold an evidentiary hearing to discern whether a deliberate bypass has occurred. Thomas v. Zant, 697 F.2d 977, 988-89 (11th Cir. 1982); Buckelew v. United States, 575 F.2d 515, 519 (5th Cir. 1978); Coco v. United States, 569 F.2d 367, 370-71 (5th Cir. 1978). The district court ruled that Hall deliberately bypassed his right to vindicate himself in state court. The district court relied on one statement, but other statements to the contrary in the record indicate Hall did not bypass. Since the

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[16] More evidence supporting Hall's attorney's contention that he was unprepared to proffer any evidence because of the time limitations appears in the appendix.

record does not clearly show a deliberate bypass, the district court must hold an evidentiary hearing on whether Hall deliberately bypassed his state remedies. Thomas, 697 F.2d at 988-89.

(9) The Barring of Various Claims from a Ruling on Their Merits by the District Court.

The district court determined that certain claims raised in Hall's habeas corpus petition were barred from its consideration. It held that Hall had failed to exhaust his state court remedies as to these claims, and therefore, was precluded from raising them in federal court. Hall v. Wainwright, 565 F. Supp. 1222, 1226-35 (M.D. Fla. 1983). Hall contends he is not precluded from raising these claims for three reasons: (a) Florida does not enforce its procedural default rule in capital cases; (b) the state courts ruled on

the merits of the claims; and (c) "cause" and "prejudice" exist to excuse his default.

(a) Florida Does Not Enforce Its Procedural Default Rules in Capital Cases

Hall argues that the Supreme Court of Florida does not enforce its procedural default rules in capital cases. This claim is without merit. The Supreme Court of Florida enforces its procedural default rules in capital cases. See Meeks v. State, 382 So.2d 673 (Fla. 1980), aff'd. 418 So.2d 987 (Fla. 1982), cert. denied, 74 L.Ed.2d 1002 (1983); Adams v. State, 380 So.2d 423 (Fla. 1980). See also, Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.), cert. denied, ___ U. S. ___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

(b) The State Courts' Ruling on the Merits

Hall claims the Supreme Court of Florida ruled on the merits of certain claims, and, therefore, the state waived its procedural default rule. We disagree.

Hall points to a comment made by the Supreme Court of Florida to support his contention: "Hall presented the trial court with numerous other points regarding his sentencing. As did the trial court, we find no merit to them." Hall v. State, 420 So.2d 872, 874 (Fla. 1982). Earlier in the opinion, however, the court had stated: "[t]he majority of issues raised in the motion to vacate were raised on appeal. Most of the remaining issues could have been raised there. They are, therefore, not matters which will support a collateral attack." Id. at 873.

To discern whether procedural default

has occurred where the state courts have discussed the merits of a constitutional challenge after ruling that no procedural default has occurred, this court must determine the basis of the state court decision. Ratcliff v. Estelle, 597 F.2d 474, 477 (5th Cir.), cert. denied 444 U.S. 868 (1979). The Supreme Court of Florida based its decision on the procedural default rule. Its discussion of the merits was an effort to dispose of the claims in the event its procedural ruling was in error. Ratcliff, 579 F.2d at 478. Moreover, "a court will not reach a constitutional question if it can base its decision on nonconstitutional grounds." Ratcliff, 579 F.2d at 478. See Rescue Army v. Municipal Court, 331 U. S. 549 (1947). A state court is entitled to express its views on federal constitutional issues

without waiving its procedural default rules. See United States Ex Rel. Caruso v. Zelinsky, 689 F.2d 435, 439-41 (3rd Cir. 1982). Since the Supreme Court of Florida based its holding on a valid procedural rule, the district court was correct in not considering the claims barred for that reason. Ratcliff, 597 F.2d at 477.

(c) "Cause" and "Prejudice"

Since the state court refused to hear the constitutional claims because of its valid procedural rules, Hall must show "cause for" and "prejudice from" his failure to timely raise the claims. Engel v. Isaac, 456 U.S. 107, 110-11, 102 S.Ct. 1558, 1562 - 63, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 90-92, 97 S.Ct. 2497, 2508 - 09, 53 L.Ed.2d 597 (1976); Sullivan v. Wainwright, 695 F.2d

1306, 1310 (11th Cir. 1983). Hall contends that cause exists for his failure to timely raise these claims because his counsel was ineffective.

Because it held that Hall had deliberately bypassed state opportunities to present the claim, the district court never ruled on the merits of Hall's ineffective assistance of counsel allegations. Therefore, we cannot determine whether Hall has established "cause" because of his counsel's ineffectiveness until the district court holds a hearing on the deliberate bypass issue. If the district court concludes that Hall did not deliberately bypass his state remedies, it must hold a hearing on the ineffective assistance of counsel claims and if the district court finds that Hall's counsel was ineffective, Hall is entitled to a new

trial. The establishment of "cause" and "prejudice" becomes irrelevant. If the district court determines that Hall's attorney was effective, Hall has failed to establish "cause." If the district court holds that a deliberate bypass has occurred, Hall will never be able to show "cause" because his ineffective assistance of counsel claim will be barred from our review. Resolving this issue, therefore, depends on the district court's ruling on whether a deliberate bypass has occurred.

At the hearing on the deliberate bypass issue, the parties should be allowed to show the circumstances which lead to Hall's absence during communications with the jury. The district court judge may designate the procedure to be used by the parties to make these circumstances known.

Conclusion

Having determined that Hall is entitled to a hearing on his absence from the courtroom issue and an evidentiary hearing on whether he deliberately bypassed, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX

During the 3.850 motion hearing, Hall's attorney stated, in part:

> With the Court's indulgence, I would like to read into the record, since our appointment the work schedule which Mr. Johnson and I together have engaged in solely related to this matter. The time records herein are the times that we were both working together. In other words, I have not added the times together, these would be double if you were counting man power.
>
> Tuesday, September 21, 1982, 10:30 A.M. to 6:00 P.M. we went to Florida State Prison in Starke, conferred with the defendant and began our draft on the initial motions. Wednesday, September 22, 7:30 in the morning through 6:30 in the afternoon, except for about an hour and a half, we had to attend other business, reviewed the trial transcript. Thursday, September 23, 8:00 in the morning until 10:30 in the evening, less one hour when we were required to be in Court in Tavares, reviewed the trial transcript. Friday, 8:00 in the morning through 12 midnight, we

reviewed the trial transcript and depositions taken by counsel. Saturday, September 25, 9:30 in the morning until 10:00 in the evening, we completed review of the trial transcript. Sunday, September 26, 10:00 A.M. through 8:30 P.M. we prepared draft motions and draft of rule 3.850 motions, Application for Stay of Execution, and Memorandum in Support Thereof, and other documents. Monday, September 27, from 9:00 A.M. on that day through 3:00 A.M. the next day, prepared pleadings, etc.

and attended a hearing before you with regard to certain outstanding motions.

....

I would state for the record neither I nor Mr. Johnson have reviewed Mr. Aulls and Robuck's files. In fact, both of them refused to give us their files until we gave them a letter from Mr. Hall suggesting his permission which I also suggest was exactly what they should have done as counsel. It was only two days ago we were able to obtain that written release from the Defendant, not because of any delay on his part or ours, but we just didn't understand that it would be their position

although we should have anticipated that.

We have been through their files to some extent. Mr. Johnson has looked at Mr. Robuck's file with particular regard to how much time was spent on the case. We'd like to state clearly and unequivocally in the record we are not suggesting that Mr. Aulls and Mr. Robuck are incompetent lawyers. They are, rather, respected members of the Lake County Bar. Our suggestion in the brief is that they may not have provided effective assistance of counsel in this particular case due to a myriad of factors which we're not prepared to discuss or examine them on.

We also suggest we didn't know what issues to even begin to investigate until we read the eleven-hundred-page transcript and examined the documents.

I have nothing to offer at an evidentiary hearing at this time, Your Honor, except for one matter.

....

I do realize the trial strategy defense is there and that to the extent someone can allege somewhere it was a matter of strategy and tactics rather than

> ineffective assistance and perhaps the same wouldn't be claimed. As I said before, some of these claims may stand, some may not. I am not prepared to proceed at this time, Your Honor, realizing full well, having followed Mr. Ruffin's case very carefully, precisely the wrath which I will incur when I come before the Florida Supreme Court not having put on testimony. I choose to do that as a matter of tactics at this time.

JAMES C. HILL, Circuit Judge, specially concurring

I write separately because, although I agree with much of the majority opinion, I disagree with the resolution of the issues: (1) the constitutionality of the prosecutor's closing argument at Hall's trial (part 4 B); and Hall's right to presence at his trial (part 7).

I

The majority concludes that the prosecutor's closing argument, in which he expressed his personal opinion that there

existed "no mitigation in this particular case," did not deny Hall a fundamentally fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). I agree completely with this conclusion. I have some doubt, however, as to the majority's statement that "it is of critical importance that a prosecutor not play on the passions of the jury with a person's life at stake." In many cases in which the prosecutor seeks the death penalty, simply reciting the facts of the crime is enough to incite the "passions" of the jury. I therefore seriously doubt that this analysis, although supported by Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), is the proper method to resolve these types of cases. Of course, the opinion in Hance is binding on this panel, and I do not fault the majority's reliance

on Hance. I write separately on this issue because it will soon be before the court en banc, at which time we will address this issue anew. (The "closing argument" issue is presented in several of the cases slated for en banc consideration in June.)

II

I also disagree in part with the majority's resolution of Hall's contention that he was not present at all stages of his trial. First, I believe this claim may be barred, at least in part, by a procedural default. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Ford v. Strickland, 696 F.2d 804, 816 (11th Cir. 1983) (en banc), cert. denied, __ U.S. __ 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). Hall did not raise this claim on his direct appeal, and the Florida

court stated, in resolving Hall's appeal from his Rule 3.850 proceedings:

> The majority of issues raised in the motion to vacate were raised on appeal. Most of the remaining issues could have been raised there. They are, therefore, not matters which will support a collateral attack. Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979). Several of the points raised, however, merit discussion.
>
> Hall claims that he was not present during some of the jury selection and that his absence abrogated his fundamental constitutonal rights. Francis v. State, 413 So.2d 1175 (Fla. 1982). The trial court found Francis distinguishable from the instant case. We agree. Hall was not present at the roll call of prospective jurors or at the general qualifications of prospective jurors. He was, however, present at all critical stages of the proceedings and available to consult with his counsel.

Hall v. State, 420 So.2d 872, 873 (Fla. 1982). The Florida court did not address

any of the other six absences cited by Hall. Although this court will address issues passed on by a state court despite a procedural default, see Grizzel v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983), I somewhat doubt that the Florida court may fairly be said to have passed on any of the seven absences raised except the absence at the jury selection/ introductory remarks. In addition,
the meaning of the statement that some issues "merit discussion," 410 So.2d at 873, is unclear. As we have stated, "[w]here the state court decision relies on both a procedural default and a lack of merit, the situation is unclear." Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983). I will nevertheless address

the merits because the majority has done so.

In discussing Hall's right to be present at his trial, the majority reads Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (1983), to "hold that a defendant may not waive his presence at any critical stage of his trial", however, they also indicate that the record requires further development to determine "whether Hall knowingly and willingly waived his right to be present.[1] I agree that the relevant

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[1] The majority presumably concludes that waiver is not permissible except at non-critical stages, when it must be knowing and voluntary; however, that position does not seem to be supported by Proffitt. In addition, this interpretation--the only one that gives meaning to both statements quoted above--fails to take into account the instruction that the district court determine whether the "absence was at a non-critical stage and, therefore,

initial inquiry is whether Hall was absent during stages of his trial that constituted "critical stages," in the sense that critical stages are "all stages of trial when his absence might frustrate the fairness of the proceedings." United States v. Stratton, 649 F.2d 1066 1080 (5th Cir. 1981) (footnote omitted); see also Proffitt, 685 F.2d at 1256 (using similar language). I do not, however read Proffitt to hold that the defendant cannot waive his presence at a critical stage (if that is the intended meaning of the majority's opinion). Although the panel in Proffitt initially reached that conclusion, see 685 F.2d at 1257-58, on rehearing the panel stated that "[w]e need not

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harmless." I believe we should be clearer in instructing a district judge concerning further proceedings on remand.

decide th issue of whether presence at a capital trial ever is waivable, however, for here, even if we assume that the right to presence in a capital case may be waived, no knowing and voluntary and, therefore, no effective waiver was made." 706 F.2d at 312 (footnote omitted) (emphasis added). Of course, we must consider whether the panel's original conclusion that the defendant cannot waive his presence was correct; but I believe upon examining the governing case law, that the panel probably reached the wrong result in their initial opinion.

The argument that a defendant cannot waive his right to be present at a capital trial draws its primary authority from three Supreme Court cases decided around the turn of the century. See Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed.2d 500 (1912); Lewis v. United

States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 101 (1892); Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262, 4 S.Ct. 202 (1884). In Proffitt, the panel originally concluded that "the only precedents directly ruling on the issue [hold] that the right to presence in capital cases is so fundamental that the defendant cannot waive it." After reviewing the three cases, however, I have come to the conclusion that they do not hold that presence at a capital trial is not waivable as a matter of constitutional law, but that any such indication is merely dicta. Furthermore, subsequent Supreme Court cases--both by holding and by dicta--seem to me to discredit the earlier statements. Having boldly stated this proposition, I believe a review of the cases is in order.

In Hopt, the defendant was found

guilty of first degree murder and sentenced to death. At trial, the defendant challenged six jurors on the basis of bias. Under the then-current Utah procedure, other jurors were appointed "to try the challenge," (to determine whether the six were biased) and proceeded to do so out of the presence of the defendant, 4 S.Ct. at 702. Although defendant Hopt failed to enter an objection at trial, he contended, both in an intermediate appeal and before the Supreme Court, that his conviction was invalid because the hearing on this issue of bias was not held in his presence. Faced with the argument that Hopt had waived his right to be present, the Court held that "it was not within the power of the accused or his counsel to dispense with the statutory requirement [under the Utah criminal code] as to

his personal presence at the trial." Id. at 204. Although the Court also cited the due process clause, a close reading of the decision demonstrates that the due process analysis was not the basis of the Court's decision on waiver; thus, the opinion does not support the proposition that the defendant, as a matter of constitutional law, may not waive his presence at trial. The Court stated:

> The argument [in support of waiver] necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority." 1 Bl. Comm. 133. The public has

an interest in his life and liberty. Neither can lawfully be taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiration or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and the object of punshment for public wrongs, the legislature had deemed it essential in the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without so present [sic], such deprivation would be without that due process of law required by the constitution.

Id. 4 S.Ct. at 104-05.

Thus, in Hopt, the Court held that the Utah statute under the teachings of Blackstone, was not one for the protection of the accused but for the protection of the public. From this, the Court reasoned that it was not for the accused to waive the benefit of the statute, basing its holding as to waiver on late nineteenth century concepts of natural/common law (not on the due process clause). Having disposed of the waiver issue on those grounds, there was no need for the court to address any constitutional limitation on waiver. I think that the fair reading of the opinion is that the Court did not do so, but in any event, statements on that subject would have been dicta. The Court's constitutional holding was that the statute was of such importance that

the failure to follow it would amount to a deprivation of due process. Significantly the case does not rest on the Sixth Amendment right to confront witnesses, which was not then "applicable" to the states, see Pointer v. Texas, 380 U.S. 400, 403, 35 S.Ct. 1065, 1067, 13 L.Ed.2d 923 (1965) (incorporating confrontation clause); and it seems to me that the claim that the state violated due process by failing to follow its own statutes or the common law is both not present in this case and discredited somewhat by later decisions. See discussion infra. To reiterate, I do not read Hopt as unequivocally stating that the defendant may never waive his presence in a capital trial; I read Hopt as stating that defendant could not waive his right under the Utah statute and that the failure of the state to

follow that statute violated due process. Later decisions of the court, see infra, support this interpretation.

In Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), another death case, the Court again discussed the issue. In Lewis, the prosecutor and the defendant were required to make their preemptory challenges independently- in other words, without knowledge on the part of either as to what challenges had been made by the other. The defendant complained of the method and preserved the error In reversing the defendant's conviction, the Court stated, in dicta:

> A leading principal that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the pris oner. While this rule has at times, and in the cases of misdemeanors, been somewhat

> relaxed, yet in felonies it is not in the power of the prisoner, either by himself, or by his counsel, to waive the right to be personally present during his trial.

13 S.Ct. at 137. In support of this statement, the Court cited common law cases and discussed Hopt. The Court went on to state, a few pages later in the opinion, that "all rules of practice must necessarily be adapted to secure the rights of the accused; that is, where there is no statute, the practice must not conflict with or abridge the right as it exists in common law." Id. at 139. Thus, a reading of Lewis yields, to me, two conclusions. First, the Court did not have before it in that case the issue of whether the defendant may waive his right to presence; Lewis had properly objected and had no intention of waiving his right. Second, the Court relied largely, if not

exclusively, on common law principles in reversing Lewis' conviction. Indeed, in Lewis (a United States criminal conviction) the Court did not mention or cite any provision of the Constitution. Thus, in my view, Lewis does not support the proposition that presence in a capital case is nonwaivable. (Indeed, the panel in Proffitt apparently did not rely on Lewis.)

Finally, in 1912, the Supreme Court decided the case of Diaz v. United States, 32 S.Ct. 250. Diaz, although it involved a homicide, was not a capital case. Id. at 251. Diaz objected that he was wrongly convicted because the trial proceeded in part in his absence. The Court noted that the record demonstrated that he was present during all of the trial except for two occasions. On these instances,

> [i]n the latter part of the trial,

> he voluntarily absented himself, and sent to the court a message expressly consenting that the trial proceed in his absence, which was done. On these occasions two witnesses for the government were both examined and cross-examined. No complaint grounded upon his absence was made in the trial court or in the Supreme Court of the Philippines; and the objection now made is that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence.

Id. at 253. In resolving this claim, the Court first decided that, under Philippine law (the case was on appeal from the Philippines), the defendant could waive his right to be present. The court then addressed the effect of Section 5 of the Philippine Civil Government Act, which was substantially equivalent to the Sixth Amendment. In holding that the Civil Government Act did not bar waiver, the

Court made the following statement:

> And with like accord they have regarded an accused in custody and one who is charged with a capital offense as incapable of waiving the right; the one because his presence or absence is not within his own control; and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absenced himself, this does not nullify what has been done or prevent the completion of the trial, but on the contrary, operates as a waiver. . .

Id. at 254. In discussing Hopt and Lewis, the Court stated:

> In each [case] the accused was in custody charged with a capital offense, and was sentenced to death. In the first [Hopt], a part of the trial was had in his absence notwithstanding the territorial statute [that]

> declared that he "must be personally present." He did not object at the time, and it subsequently was claimed that, by his silence, he had consented to what was done. But this court held otherwise [see quote above]. In the second case [Lewis], "the prisoner was not brought face to face with the jury until after the challenges had been made and selected jurors were brought into the box to be sworn," and he excepted at the time to the mode in which the challenges were required to be made.

Id. at 255. A review of Diaz leads me to, primarily, one conclusion. Diaz was not a capital case, and, therefore, the indication by the Court in Diaz that the defendant cannot waive his presence in such a case is dicta (or perhaps in the nature of an exception to the holding). (I include here the long quotes from Diaz because, in Illinois v. Allen, 397 U.S. 337 (1970), discussed infra, the Court implied that the Diaz principles of

waiver apply in all cases, not only non-capital cases.

As is apparent from the Court's opinion in Diaz, Lewis did not address the issue of waiver; and, as I have discussed above, I do not believe that Hopt stands for the proposition for which the court in Proffitt originally cited it. Thus, the three cases are of limited value on the troublesome issue. I believe that my reading of the three cases discussed above is supported by their interpretation in subsequent Supreme Court decisions. See Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (not a capital case); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed 674 (1934) (a capital case); Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915) (a capital case); Howard v. Kentucky, 200

U.S. 164, 26 S.Ct. 189 50 L.Ed. 421 (1906).

In Frank, the Court was faced with the contention that Frank's absence from certain portions of his trial violated the due process clause under the rule stated in Hopt v. Utah. In discussing Hopt, the Court made the following statement:

> the court [in Hopt] had under review a conviction in a territorial court after a trial subject to local code of criminal procedure, which declared: "if the indictment is for a felony, the defendant must be personally present at the trial." The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant, and his counsel. The ground of the decision of this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement as to his personal presence was denied on the ground that his life could not be lawfully taken except in

> the mode prescribed by law. No other question was involved.

35 S.Ct. at 592 (some emphasis in original; some added). The Court went on to state that:

> The distinction between what the common law requires with respect to trial by jury in criminal cases, and what the states may enact without contravening the "due process" clause of the Fourteenth Amendment, is very clearly evidenced by . . . opinions written by Mr. Justice Schrass. In the Lewis case, which was a conviction of murder in a circuit court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of the statute, this right as it existed at common law must not be abridged. But in the Hallinger, 146 U.S.

> 314, 13 S.Ct. 105, 36 L.Ed. 986 (1892), case where a state by legislative enactment had permitted one charged with a capital offense to waive a trial by jury and elect to be tried by the court it was held that this method of procedure did not conflict with the Fourteenth Amendment. So in Howard v. Kentucky, 200 U.S. 164, 175, 50 L.Ed. 21, 426, 26 S.Ct. Rep. 189,--a case closely in point upon the question now presented --this court finding, that by the law of the state an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not amount to a denial of due process within the meaning of the Fourteenth Amendment.

Id. at 592-93.

I note that the Frank court accurately repeated the holding in Howard v. Kentucky, and that in Howard the Court specifically held that the defendant's presence at a voir dire on the issue of prejudice--the situation in Hopt--was not constitutionally mandated. Furthermore,

the Court held that a possible misapplication of a state statute did not violate the due process clause, placing Hopt's validity in question on that point, also.

In Snyder, the Court expressly noted that Hopt had been distinguished and limited by Frank, 291 U.S. at 106, 54 S.Ct. at 332. (The Court in Snyder held that the defendant need not be present during a jury view of the scene of the crime because that does not constitute a critical stage of the trial.) And, finally in Illinois v. Allen, the Court stated:

> The broad dicta in Hopt v. Utah, supra and Lewis v. United States, 146 U.S. 370 [13 S.Ct. 136, 36 L.Ed. 1011] (1892), that a trial can never continue in the defendant's absence, have been expressly rejected. Diaz v. United States, 223 U.S. 442 [32 S.Ct. 250, 56 L.Ed. 500] (1912). We accept instead the statement of Mr. Justice Cardozo who, speaking for the court in

> Snyder v. Massachusetts . . . said: "no doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct."

397 U.S. at 342-43, 90 S.Ct. at 1060 - 61. The Court in Illinois v. Allen clearly read Diaz, even though it was not a capital case, as discrediting the broad dicta in the earlier two cases. In addition, the Court in Frank expressly discredited the dicta in these cases and read them as relying primarily on state statutes and the common law. Thus, it seems to me that reliance on Hopt (which seems to be the primary case put forth as support) to argue that the defendant may not waive his presence at a capital trial is unwarranted.

To avoid belaboring the issue any more than I already have, I would conclude that the defendant may waive his presence

in a capital trial and that he may do so in any of a variety of ways. First, he may waive his right to presence by misconduct. See Illinois v. Allen. Second, he may waive his right to presence simply by failing to show up for the trial through no fault of the state. Diaz v. United States; see also United States v. Martinez, 684 F.2d 361 (5th Cir. 1979), cert. denied 444 U.S. 1034, 100 S.Ct. 708, 62 L.Ed.2d 671 (1980). Finally, if the defendant is in custody, he may waive his presence under the knowing and voluntary standard enunciated in Proffitt, 706 F.2d at 312. (In Proffitt, the defendant, who was apparently in custody, did not even know of the hearing.) I realize that in the rehearing decision in Proffitt the court interpreted Diaz and Hopt differently than I have in this opinion; however,

given the court's express disclaimer of ruling on whether presence could be waived, I do not believe that that interpretation is binding on this panel.

Abandoning for the moment the rather complex constitutional issues presented by this case, I feel that it is possible to resolve some of the subissues presented by Hall on appeal without a remand to the district judge. First, Hall urgues that he was absent during the voir dire and selection of the jury; however, the district court noted that the state court found that he was, in fact, present for most of the proceedings. See Hall v. Wainwright, 565 F.Supp. 1222, 1239 (M.D. Fla. 1983). This historical fact is supported by the record, and the district court's resolution of the issue by relying on the state finding seems to be proper.

See Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The Florida Supreme Court noted, however, that Hall was not present during the "roll call of prospective jurors or at the general qualification of prospective jurors." Hall v. State, 420 So.2d 823, 872 (Fla. 1982). A review of the record indicates that the trial judge made opening remarks to the venire, introduced court personnel, instructed the venire concerning sequestration, and read the indictment. In addition, the judge excused several female veniremembers because they had children younger than age fifteen and excused numerous veniremembers on the basis of hardship or medical necessity. The trial judge also asked questions concerning exposure to pretrial publicity and excused several more jurors. At this point, the

defendant entered the courtroom.

It is this absence during the voir dire proceedings on pretrial publicity that, in my opinion, necessitates a remand to the district court for a finding whether Hall knowingly and voluntarily waived his right to presence. (The absences during other portions of the voir dire do not appear to be critical.) The parties cite only one case, Howard v. Kentucky, 200 U.S. 164, 26 S.Ct. 189, 50 L.Ed 421, 26 S.Ct. 189 (1906), that addresses the constitutional right to presence at voir dire proceedings. In Howard, the Court held that the defendant's absence during a hearing conducted by the judge on the issue of bias does not violate the due process clause. [2] Id. at 192. The prosecutor

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[2] The Court stated:

had moved to strike the juror on the basis of an affidavit of another juror; the judge held the hearing to determine the veracity of the allegations contained in the affidavit. Arguably, the holding in Howard could be interpreted to govern in this case--presumably supporting a decision that the voir dire was not a critical stage. I think Howard and this case differ in important ways, however.

But we are unwilling to say that one charged with felony and being in court, as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jury to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury.

Id. at 192.

First, as is clear from the opinion, see supra note 2, the Court in Howard relied to a large degree on the defendant's acquiescence in the procedure followed. The Court decided Howard before the advent of the knowing and voluntary standard applicable to waiver in this case, see Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); and, in this case, an evidentiary hearing on waiver is necessary to determine whether any waiver was knowing and voluntary. Second, there is a greater possibility that Hall's absence, as compared to the defendant's absence in Howard, could have resulted in prejudice. Although the juror excused in Howard appeared to favor the defendant, the defendant personally could have added little to the hearing on bias--from the case it seems that the defendant had no

first hand knowledge of the issue. In this case, however, Hall might have known some of the jurors; perhaps he could have aided his attorney in formulating questions or pointing out possible problems.

Thus, given this record, I agree that a hearing would be helpful on this sub-issue. I would instuct the trial judge to inquire whether Hall properly waived his right to presence and to explore the possibility that the absence was harmless beyond a reasonable doubt. Although I would be willing to hold harmless some of Hall's absences without further hearings, see infra, I believe a hearing on harmlessness might be helpful here.

As to Hall's other claims, it seems to me that United States v. Provenzano, 620 F.2d 985 (3d Cir. 1980), cert. denied, 409 U.S. 894 (1972) and United States v.

Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied, 449 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1980), resolve adversely to Hall his claim that he had the right to be present at the discussion of various legal motions; it also seems that United States v. Dominguez, 615 F.2d 1093, 1094-96 & n. 4 (5th Cir. 1980), which held that excusal of a juror out of the defendant's presence under certain circumstances does not violate the defendant's Rule 43 (of the Federal Rules of Criminal Procedure) right to presence, resolves adversely to Hall his claims that he should have been present both when the jury was dismissed and when alternate jurors were excused. Under Dominguez, it is permissible for the judge to excuse an active member of the jury during trial. See

id.[3] The defendant's right to presence guarantees that he will be available to assist in the conduct of his defense--it is not simply a guarantee that he can observe the proceedings. See Gradsky, 434 F.2d at 883. Thus, it seems to me that excusal of alternate jurors and excusal of the jury after trial were not critical stages at which Hall should have been present. In any event, I would hold harmless beyond a reasonable doubt his absence at

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[3] Both Rule 43 of the Federal Rules of Criminal Procedure, which guarantees the defendant the right to presence at all stages of his trial, and the Sixth Amendment were at issue in Dominguez (and several other cited cases.) Rule 43 requires presence at stages of the trial when presence would not constitutionally be mandated, see generally 3A Wright, Federal Practice & Procedure § 721 et seq.; therefore, Dominguez supports a holding based either on Rule 43 or the Constitution (Of course, cases mandating presence under Rule 43 do not necessarily support a constitutional right to presence under similar circumstances.)

these events of minor importance. See Dominguez, 615 F.2d at 1096, n.4; Proffitt, 685 F.2d at 1260; Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). I am also prepared to hold that marking of an exhibit for identification was not a critical stage or, if it was, that Hall's absence was harmless beyond a reasonable doubt.

This partially resolves six of Hall's seven absences; only his claim that he should have been present during the trial judge's discussion of certain items of evidence with the jury during their deliberation remain. The transcript records the following exchange between the court and

jury:

WHEREUPON, JURY RETURNED TO OPEN COURT AT 5:55 P.M., JUNE 22, 1978, AND THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: Mrs. Wheeler, I believe you've been selected forewoman?

FOREWOMAN: Yes, sir.

THE COURT: I understand you and the rest of the jurors feel you would like to recess at this time and come back in the morning. All right. I think that is a wise decision. I want to again admonish you not to watch or read or listen to any news broadcasts of the trial or any newspaper articles concerning the trial.

All right, Mr. Johnson here will bring you back in the morning when you have finished your breakfast and you can begin your deliberations again at that time. Do any of you have any questions?

FOREWOMAN: We'd like to look at some of the evidence.

THE COURT: All right, do you have the items listed?

FOREWOMAN: I know some of them

> we wanted to look at, the orange grove, the park, the entrance to the scene of the crime.
>
> THE COURT: Let me say this, you can think about that tonight and make a list of them and give it to Mr. Johnson, and we will make arrangements for you to come into the courtroom tomorrow and look at this.
>
> All right, court is in recess.
>
> COURT RECESSED FOR THE DAY.

The record does not show whether Hall's attorney was present during this exchange.

In United States v. Benavides, the former Fifth Circuit held that Rule 43 "affords the defendant the right to be present at all stages of his trial, including presence during communication between court and deliberating jury." 549 F.2d 392,393 (5th Cir. 1977) [citing Rogers v. United States, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). It may

be that the Constitution does not require presence in this situation although Rule 43 does, see supra note 3; however, communications between court and jury are an important stage of the trial, and I would hesitate to hold that stage to be not critical. I nevertheless disagree that this issue should be remanded to the district court. As the Benavides court noted, the "error can be harmless," 549 F.2d at 393; and, in this case, I think Hall's absence was harmless.

A comparison of this case with Benavides and Rogers illustrates my conclusion. In Benavides the court's communication instructed the jury, which could not reach a verdict, to "consider the offense further." Id. (emphasis added). This phrasing was obviously prejudicial. In Rogers, the court, without consulting the

parties, informed the jury (in reply to their inquiry) that he would accept a verdict of guilty with a recommendation of mercy. 422 U.S. at 36-38, 95 S.Ct. at 2093 - 94. This also was prejudicial "[a]t the very least, the court should have reminded the jury that their recommendation would not be binding in any way." Id. at 40, 95 S.Ct. at 2095.

Neither of these situations nor a situation raising a similar possibility of abuse is present in this case. As the transcript indicates, the judge simply instructed the jury not to read or view anything concerning the trial. He then informed the jury that they could view any item of evidence the next morning; in doing so, he simply followed the applicable Florida law. Florida Rule of Criminal Procedure 3.400 provides:

> The court may permit the jury, retiring for deliberation, to take to the jury room:
>
> * * *
>
> (d) all things received in evidence other than depositions If the thing received in evidence is a public record or a private document which, in the opinion of the court, ought not to be taken from the person having it in custody, a copy shall be taken or sent instead of the original.

Thus the jury clearly had the right to view the evidence requested. By delaying the request until the next morning, the judge ensured compliance with Florida Rule 3.410 (to the extent it may apply), which provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who had them i charge and the court may give them such additional instructions or may order such testimony

> read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for defendant.

Thus, it is clear that the judge strictly followed the applicable law and that Hall's absence in this instance was harmless beyond a reasonable doubt.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3563

FREDDIE LEE HALL,

Petitioner-Appellant,

versus,

LOUIE L. WAINWRIGHT, Secretary Florida Dept. of Offender Rehabilitation; RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion May 16, 1984, 11 Cir., 198_, ____F.2d ____).

(November 30, 1984)

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

* Hon. Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama sitting by designation.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rue 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the

reconsideration of this cause en banc, and a majority of the judges in active serice not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

(s)
United States Circuit Judge

Freddie Lee HALL, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, Richard Dugger, Superintendent of Florida State Prison at Starke, Florida and Jim Smith, Attorney General of the State of Florida, Respondents.

No. 82-195-Civ-Oc.

United States District Court, M.D. Florida, Ocala Division.

May 18, 1983.

On petition for writ of habeas corpus, the District Court, Susan H. Black, J., held that: (1) asserted error not of constitutional magnitude would not be heard for the first time on petition for federal habeas corpus relief; (2) evidence permitted jury to find guilty of first-degree murder; (3) assertedly improper remarks by prosecutor were not ground for

federal habeas corpus relief; and (4) record failed to establish ineffective assistance of counsel.

Certain claims dismissed with prejudice; other claims denied.

1. Habeas Corpus 25.1(1)

Where state appellate court does not rely on procedural default, for whatever reason, federal court on application for habeas corpus must reach merits also. West's F.SA. RCrP 3.850; 28 U.S.C.A. §2254.

2. Habeas Corpus 25.1(1)

Where Florida Supreme Court on appeals from denial of postconviction relief divided claims into those raised on direct appeal, those precluded from collateral review due to procedural default and those which merited discussion, and court then went on to affirm denial of

relief wihout discussing certain claims on their merits, federal district court on application for habeas corpus relief was required to conclude that such claims, not discussed, had been regarded as precluded from collateral review in the courts of Florida. West's F.S.A. RCrP 3.850; 28 U.S.C.A. §2254

3. Habeas Corpus 25.1(1)

State court's holding of procedural default in state courts prevents federal review of that claim absent showing of cause and prejudice to excuse default. West's F.S.A. RCrP 3.850; 28 U.S.C.A. §2254.

4. Criminal Law 998(3)

Florida has and enforces procedural default rule where motion to vacate initially raises issues which could have and should have been raised on direct appeal.

West's F.S.A. RCrP 3.850.

5. Habeas Corpus 45.3(1)

Issue of deliberate bypass is irrelevant once procedural default is found, since state prisoner can forego opportunity to raise constitutional issues in habeas corpus proceedings by merely failing to follow them without showing both cause for default and prejudice resulting from it.

6. Habeas Corpus 54

Mere allegations of ineffective assistance of counsel do not satisfy requirements of showing that ineffective assistance was cause of procedural default. West's F.S.A. RCrP 3.850.

7. Habeas Corpus 25.1(6)

Prejudice from alleged ineffectiveness of counsel is not shown for purposes of federal habeas corpus, by mere fact

that defendant received sentence of death, but, rather, petitioner must show actual and substantial disadvantage infecting entire trial with error of constitutional dimensions. 28 U.S.C.A. §2254.

8. Habeas Corpus 25.1(1)

Defendant's failure to raise claims on direct appeal constituted procedural default which precluded collateral review in state courts and likewise precluded federal review absent any additional theory of cause and prejudice which would excuse procedural default as to such claims. West's F.S.A. RCrP 3.850; 28 U.S.C.A. §§2254, 2254(b).

9. Criminal Law 998(3)

Claim which could not have been raised on direct appeal was properly raised by motion to vacate under Florida statute. West's F.S.A. RCrP 3.850.

10. Habeas Corpus 25.1(1)

That state court of review touched upon merits of claims does not necessarily amount to waiver of procedural default rule, for purposes of federal habeas corpus, and mere statement of state reviewing court that it finds no merit in certain claims does not amount to rejection and waiver of enforcement of procedural default policy. West's F.S.A. RCrP 3.850; 28 U.S.C.A. §2254.

11. Habeas Corpus 25.1(1)

Where state did not raise issue of procedural default and state court holding is ambiguous, no presumption of preclusion inheres in proceeding for federal habeas corpus. West's F.S.A. RCrP 3.850; 28 U.S.C.A. §2245.

12. Habeas Corpus 45.3(1)

Where claim had been exhausted by way

of class-action state habeas petition of which petitioner was class member, and was resolved against class, it would be considered by federal distict court in habeas corpus proceeding. 28 U.S.C.A. §2254.

13. Habeas Corpus 45.2(4)

Violation of state evidentiary rules does not alone invoke federal habeas relief, the federal court's inquiry being limited to examination of whether federally guaranteed rights were violated, and only where admission of certain evidence is so prejudical as to constitute denial of fundamental fairness will federal courts intervene. U.S.C.A. Const.Amends. 5, 6, 14; 28 U.S.C.A. §2254.

14. Federal Courts 381

Federal district court was bound by state court's determination of its own law.

15. Criminal Law 369.2(1), 369.15

Under Florida law, evidence of commission of "collateral crimes" is admissible if relevant to issue being litigated, and identity is recognized as legitimate relevant issue.

16. Criminal Law 369.15

Evidence of collateral crime, introduced in capital case in Florida court on issue of identity, was not so overwhelmingly prejudicial that state court was in error in admitting it.

17. Criminal Law 59(5)

Under Florida law, aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. West's F.S.A. §777.011.

18. Homicide 354

Under Florida law, for sentencing purposes, premeditated design to effect

death of human being is fully formed and conscious purpose to take human life, and circumstantial evidence must be relied upon by the jury in resolving the issue, and such facts and circumstances may include manner by which death is effected, nature and manner of wounds inflicted and actions of accused prior to and subsequent to the homicide. West's F.S.A. §§782.04(1)(a), 921.141.

19. Homicide 234(5), 253(3)

Ample evidence permitted finding beyond reasonable doubt that either petitioning defendant or his confederate killed with premeditated design and that party other than the one who killed was aider and abettor and was therefore principal to first-degree murder. West's F.S.A. §921.141.

20. Criminal Law 721(3)

Prosecutor's argument to jury that defendant was asleep was not improper comment on defendant's failure to testify.

21. Criminal Law 721(3)

Prosecutor's comments including comment that "We have a deceased woman, she can't testify" were not improper as comments upon defendant's failure to testify.

22. Habeas Corpus 45.2(4)

A defect of constitutional proportion is not to be found merely because prosecutor's remarks were undesirable or even universally condemned, but only in egregious cases.

23. Habeas Corpus 30(1)

Factors to be considered in evaluating prosecutorial misconduct in habeas case are degree to which challenged remarks have tendency to mislead jury and to prejudice accused, whether they are

isolated or extensive, whether they were deliberately or accidentally placed before jury, and strength of competent proof to establish guilt of the accused.

24. Habeas Corpus 45.2(4)

Prosecutor's conduct may be improper without being unconstitutional, and although interjections by prosecutor of his personal opinion on lack of mitigating circumstances might be reversible error under Florida law and even reversible error in appeal from federal criminal case, it may not be sufficient error to mandate federal habeas corpus relief. 28 U.S.C.A. §2254.

25. Habeas Corpus 45.2(4)

Prosecutor's remark, in Florida capital case, "Ladies and gentlemen of the jury, with all due sincerity, I don't see any mitigation in this particular case"

was not error of constitutional magnitude and did not warrant relief in federal habeas corpus. 28 U.S.C.A. §2254.

26. Criminal Law 986.2(1)

Sentencing judge must consider in mitigation any aspect of defendant's character or record and any circumstances of offense that defendant offers as basis for sentence less than death, but it is clearly within province of sentencer to determine weight to be given to evidence of relevant mitigating circumstances, and in some instances such evidence may properly be given little weight. U.S.C.A. Const. Amends. 8, 14; West's F.S.A. §921.141(6)(b, f).

27. Criminal Law 986.2(1)

As to mitigating circumstances in capital case, law requires only that defendant be permitted to present evidence

in mitigation, and requires sentencer to listen. U.S.C.A. Const.Amends. 6, 8, 14; West's F.S.A. §921.141(6)(b, f).

28. Constitutional Law 268(6)

Criminal Law 636(1)

On record, defendant was present at all critical stages of proceedings, and none of absences of record occurred at times which would jeopardize his right to due process of law, nor did they result in any injury to his substantial rights. U.S.C.A. Const.Amend. 6.

29. Homicide 354

Murder conviction, even reduced from first to second degree, still met statutory criteria in Florida for an aggravating circumstance. West's F.S.A. §921.141(5)(b).

30. Habeas Corpus 59

Federal habeas petitioner, to obtain

evidentiary hearing based on assertion that material facts were not adequately developed in state court proceeding, must show that facts pertaining to federal constitutional claim were not adequately developed at state court hearing and that fact was material or crucial to fair, rounded development of material facts, and must also show that failure to develop material fact at state's proceeding was not attributable to petitioner's inexcusable neglect or deliberate bypass. 28 U.S.C.A. §2254.

31. Habeas Corpus 90

Where state court judge made detailed and exhaustive findings of fact on competency of defendant's trial counsel, federal district court, in habeas corpus proceeding, could, in its discretion, adopt such findings without affording further

opportunity to produce evidence. West's F.S.A. RCrP 3.850; 28 U.S.C.A. §2254.

32. Habeas Corpus 98

Whether counsel has rendered adequate assistance is mixed question of law and fact requiring application of legal principles to historic facts of case. U.S.C.A. Const.Amend. 6.

33. Habeas Corpus 25.1(6)

In case in which defendant himself testified on issue, decision not to present any other live witnesses on same issue was tactical decision precluding cross-examination of those witnesses which federal district court, in habeas corpus proceeding, would not second guess. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. §2254.

34. Criminal Law 641.13(6)

Failure to present any additional

evidence at penalty stage does not per se constitute ineffective assistance of counsel. 28 U.S.C.A. §2254; U.S.C.A. Const. Amend. 6.

35. Criminal Law 641.13(2)

To show ineffective assistance of counsel on ground of alleged failure to conduct reasonable pretrial investigation into possible defenses and theories of mitigation, defendant was bound to show not only that no reasonable investigation was conducted but also that alleged ineffectiveness of counsel caused actual and substantial prejudice. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. §2254.

36. Criminal Law. 641.13(2)

Failure to object to instruction did not rise to level of denial of effective representation. U.S.C.A. Const.Amend. 6.

OPINION AND ORDER

SUSAN H. BLACK, District Judge.

I. BACKGROUND

This case is before the Court upon Petition for Writ of Habeas Corpus, filed in the Middle District of Florida on September 30, 1982. In conjunction with his petition, petitioner filed an application for a stay of execution of his sentence of death, scheduled for October 6, 1982, at 7:00 o'clock a.m. A hearing on petitioner's application for a stay of execution of the sentence of death was held on October 5, 1982. An order was entered that date by the Honorable Charles R. Scott granting the stay of execution pending a decision by the United States Court of Appeals for the Eleventh Circuit in the case of Ford v. Strickland, (now reported at 696 F.2d 804 (11th Cir. 1983) (en banc)

vacating 676 F.2d 434 (11th Cir. 1982)). Judge Scott noted that while petitioner alleged numerous grounds for relief, that ground which raised issues to be resolved in Ford v. Strickland was sufficient to require the Court to grant the stay of execution pending the outcome in that case. Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982). Accordingly, Judge Scott entered a stay of execution on October 5, 1982.

The instant petition was then transferred pursuant to Middle District Rule 1.03(d) to the Honorable Susan H. Black for all further purposes and proceedings. (See Order entered on October 8, 1982, by Judge Charles R. Scott). In order to facilitate a prompt review on the merits of the remaining grounds raised by the petitioner, the Court reviewed the petition

and the grounds asserted in support thereof. The Court also reviewed the response to the petition by the State of Florida.

The Court noted that throughout their response to the petition, respondents asserted that petitioner failed to object "at trial or on appeal" to a proceeding now challenged on federal habeas review. Respondents argued that this failure precludes collateral relief by way of federal habeas review, and have cited Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1976) and Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) for the proposition.

The Court also noted, however, that petitioner had filed a Fla.R.Crim.P. 3.850 Motion for Post-Conviction Relief in the Circuit Court of the Fifth Judicial

Circuit, Sumter County, Florida on September 28, 1982, in which he raised almost every claim before this Court in the instant petition for habeas corpus. The Rule 3.850 motion was denied after an evidentiary hearing by Judge John W. Booth on October 1, 1982. On October 5, 1982, the Supreme Court of Florida upheld this denial and at the same time denied petitioner's state habeas petition. Hall v. State, 420 So.2d 872 (Fla. 1982).

In order to ascertain the procedural status of petitioner's federal claims, the Court on January 21, 1983, ordered that petitioner respond in writing to each and every assertion by the State of Florida that a claim raised by petitioner is precluded from federal habeas review. On February 9, 1983, petitioner did so. After reviewing this memorandum, the Court

concluded that a reply from the State of Florida would be useful and issued an order granting the State time to do so prior to this Court proceeding on the merits of the habeas petition. On February 28, 1983, the State filed its reply memorandum.

The Court has now concluded its review of the habeas petition and will, by separate judgment this date, dismiss it in part and deny it in part for the following reasons.

II. INSTANT FEDERAL CLAIMS

Hall presents twenty-six constitutional claims for federal review. These may be divided into those going to the guilt phase of his trial, and those going to the sentencing phase. As stated by Hall, they are:

Guilt Phase

A. Mr. Hall was absent from the courtroom several times during the course of his capital trial, in violation of his rights to due process of law and to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution.

B. Mr. Hall's trial was rendered fundamentally unfair, in violation of the Fifth and Fourteenth Amendments, by the admission of evidence of collateral offenses, which became a feature of the trial rather than an incident thereto.

C. Mr. Hall was denied his rights to due process of law and to be free from cruel and unusual punishment when he was convicted and sentenced to death without sufficient evidence to prove his guilt beyond a reasonable doubt, in violation of the Eighth and Fourteenth Amendments to

the Constitution of the United States.

D. The trial court failed to define the burden of proof in the instructions to the jury at the guilt phase of Mr. Hall's trial, in violation of his rights to due process of law and to reliability in the guilt-determination of a capital trial, guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

E. Mr. Hall's conviction was the product of an unreliable fact-finding process because the witnesses continually testified regarding evidence which was never introduced at trial, in violation of Mr. Hall's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

F. References to the previous trial for the Coburn murder during the trial in

the instant case deprived Mr. Hall of his right to a reliable fact-finding process in a capital trial under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

G. The introduction into evidence of Mr. Hall's confession violated his privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

H. The prosecutor improperly commented on Mr. Hall's failure to testify, attempted to appeal to the sympathy or fear of the jury and argued matters not supported by any evidence, in violation of Mr. Hall's rights to due process of law, to a fair trial by an impartial jury and to a reliable determination of guilt in a capital trial as guaranteed by the Sixth,

Eighth and Fourteenth Amendments to the Constitution of the United States.

Sentencing Phase

I. The Florida Supreme Court affirmed Hall's death sentence for the Hurst murder, despite its simultaneous vacation of Hall's conviction of first degree murder for the Coburn murder which was presented to the trial jury and judge in aggravation of the Hurst murder, in violation of Hall's due process and Eighth Amendment rights to a fair and reliable determination of penalty under the Eighth and Fourteenth Amendment to the Constitution of the United States.

J. The death sentence cannot be imposed on Mr. Hall where there was no proof beyond a reasonable doubt that he killed, intended to kill, or contemplated that Hurst be killed.

K. The trial judge, in both his imposition of sentence and his instructions to the sentencing jury, improperly limited consideration of mitigating circumstances to those enumerated in the death penalty statute, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

L. Because of an inherent ambiguity in the Florida death penalty statute concerning the scope of mitigating circumstances which could be considered in sentencing, persons tried under the statute prior to July 3, 1978, were deprived of their right to a fully individualized sentence determination under the Eighth and Fourteenth Amendments.

M. The prosecutor's improper remarks during his argument at the close of the penalty phase deprived Mr. Hall of his

right to a fair trial and to a fair, reliable and non-arbitrary sentencing decision, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

N. The instructions to the jury in the penalty phase unconstitutionally shifted to Mr. Hall the burden of proving that the mitigating circumstances outweighed the aggravating circumstances, in violation of his rights to due process of law and to be free from cruel and unusual punishment under the Eighth and fourteenth Amendments to the Constitution of the United States.

O. The sentencing instructions at Mr. Hall's trial allowed for the arbitrary and capricious infliction of the death sentence by failing to adequately guide and channel the jury's discretion, in

violation of the Eighth and Fourteenth Amendments to the United States Constitution.

P. The trial court and the Florida Supreme Court improperly found and weighed certain aggravating circumstances and failed to consider and weigh certain mitigating circumstances in violation of Fla. Stat. §921.141, thereby rendering defendant's death sentence violative of the due process and cruel and unusual punishment provisions of the United States Constitution.

Q. The state court's construction of the "heinous, atrocious, or cruel" aggravating circumstance in Mr. Hall's case was unconstitutionally broad and vague, in violation of Mr. Hall's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

R. Mr. Hall was deprived of the due process required in capital prosecutions by the state's failure to provide notice of the aggravating circumstances upon which it intended to rely, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

S. As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion, permits the interjection of irrelevant factors into the sentencing process by the jury and trial judge, fails to provide for fully individualized determinations of sentence, and vitiates the appellate review required in capital cases.

T. The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors

precluded from consideration by the Florida death penalty statute and the United States Constitution, including but not limited to geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, and the race of the victim, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

U. Mr. Hall was denied the effective assistance of counsel at the guilt and penalty phases of his capital trial, in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

V. Mr. Hall was deprived of the effective assistance of counsel on appeal, in violation of his rights under the

Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

W. The Grand Jury was selected in a manner that under-represented women, in violation of Mr. Hall's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

X. The prosecutor improperly used peremptory challenges to eliminate Blacks from the jury in violation of Mr. Hall's rights to a fair and impartial jury, to equal protection and to a fair and reliable determination of sentence under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Y. Mr. Hall's jury was selected in a manner which under-represented Blacks, in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Z. The Supreme Court of Florida's practice, unauthorized and unannounced by statute or rule, of requesting and receiving ex parte information concerning appellants in pending capital appeals, without notice to these appellants or their attorneys, denied death-sentence appellants, including Mr. Hall, due process of law, the effective assistance of counsel, and the right of confrontation and subjected them to cruel and unusual punishment and to compulsory self-incrimination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment.

III. PROCEDURAL POSTURE OF FEDERAL CLAIMS

Only five of the instant federal claims were raised on Hall's direct appeal of his conviction. Most of the instant claims were raised initially by way of a motion for post-conviction relief under

Fla.R.Crim.P. 3.850 (hereinafter "3.850 motion"). Furthermore, of the five claims raised on appeal, two reappeared in the 3.850 motion with additional allegations of error. The State of Florida argues that many claims are precluded from review on the merits due to procedural default by Hall.

In order to fulfill the policies and purposes underlying the doctrines of exhaustion and preclusion, while also affording petitioner the fullest opportunity for legitimate federal review of his constitutional claims, this Court has carefully reviewed the motions, briefs, and opinions filed during Hall's direct appeal, his 3.850 motion, and the state habeas corpus proceedings. The Court has compared these state claims and their

disposition to the instant habeas petition in order to determine the procedural posture of each and every claim raised by the petition. This review is necessary in order for the Court to determine whether it should (1) dismiss the petition pursuant to 28 U.S.C. §2254(b) for failure of Hall to exhaust his state court remedies as to some claim, Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); or (2) deny a particular claim with prejudice as it is precluded from federal habeas review under the doctrine of Wainwright v. Sykes, 433, US. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1976); and (3) proceed to consider the merits of all exhausted claims. The Court has now concluded this review and will first rule upon the procedural status of each federal claim.

Guilt Phase

Claim A

[1] Federal Claim A was not raised on direct appeal. Nevertheless, the Florida Supreme Court discussed the merits of this claim in ruling on the 3.850 motion. Hall v. State, 420 So.2d 872 (Fla. 1982).[1] Accordingly, this Court finds that federal Claim "A" has been exhausted, and will, therefore, consider it on its merits later in this Opinion.

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[1] As Hall grounds this claim in part on a Florida Supreme Court decision not handed down until after his direct appeal, Francis v. State, 413 So.2d 1175 (Fla. 1982), it may be that court discussed the merits of Hall's claim on the theory that it could not have been raised on direct appeal. In any event, where a state appellate court does not rely on procedural default, for whatever reason, the federal court must reach the merits also. Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982). See County Court of Ulster v. Allen, 442 U.S. 140, 152-54, 99 S. Ct. 2213, 2222-23, 60 L.Ed.2d 777 (1979).

Claims B and C

These claims were raised and resolved against Hall on direct appeal,[2] and they will be considered on their merits later on in this Opinion.

Claims D, E, F, and G

These claims were not raised on

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[2] Federal Claim B was Issue IV on appeal. Although the State argues that Claim B was presented on direct appeal as a state law claim, see Response to Petition for Writ of Habeas Corpus, filed herein on November 2, 1982, (Response) at 15, the Florida Supreme Court appears to have construed it as a federal constitutional claim in denying it. The Supreme Court held that evidence of a collateral offense did not become a "feature" of the trial which would, of course, raise the issue of fundamental fairness. See Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981). If this claim had not been raised as a federal claim on direct appeal, it would now be precluded from federal review. See Engle v. Isaac, 456 U.S. 107, 125-26 n. 28, 102 S.Ct. 1558, 1570 n. 28, 71 L.Ed.2d 783 (1982) and Raulerson v. State, 420 So.2d 567 (Fla. 1982).

Federal Claim C was raised as Issue III on direct appeal and was denied. Hall v. State, 403 So.2d at 1324.

direct appeal. Hall raised them initially as Claims D, E, F, and G of his 3.850 motion. See Exhibit "B" to State's Response to Petition for Writ of Habeas Corpus, filed herein on November 2, 1982 (Exhibit "B"), 52-58. The state in its response to that motion argued that these claims were precluded from collateral review for failure to raise them at trial or on direct appeal. Exhibit "B" 135-36. Judge Booth denied each one as a ground for relief. Exhibit "B" 599.

On appeal, the Florida Supreme Court held that:

> The majority of issues raised in the motion to vacate were raised on appeal. Most of the remaining issues could have been raised there. They are, therefore, not matters which will support a collateral attack. Several of the points raised however, merit discussion.

Hall v. State of Florida, 420 So.2d 872, 873 (Fla. 1982). (citations omitted) (emphasis added).

[2] The Supreme Court did not discuss 3.850 Claims D, E, F, and G on their merits, and went on to affirm the trial court's denial of relief. Hall v. State, 420 So.2d 872, 874 (Fla. 1982). Therefore, a fair reading of this opinion requires this Court to conclude that the Florida Supreme Court held[3] Claims D, E,

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[3] The Court must conclude that this was the holding of the Florida Supreme Court on these challenged remarks inasmuch as that court divided the 3.850 claims into three categories: (1) those raised on direct appeal; (2) those precluded from collateral review due to Hall's procedural default in the state courts; and (3) those which "merit discussion." Hall v. State, 420 So.2d at 873.

Since the 3.850 claims raised now as federal claims D, E, F, and G were not raised on direct appeal (category 1), nor discussed by the Florida Supreme Court in its denial of the 3.850 motion (category 3), this Court must conclude that these claims fell into category #2 - those precluded from collateral review in the state courts.

F, and G precluded from collateral review in the courts of Florida.

[3-5] Under Sykes, a state court's holding of procedural default in the state courts prevents federal review of that claim absent a showing of cause and prejudice to excuse the default.[4] Engel v.

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[4] Petitioner, in response to the state's argument that this Court is precluded under Sykes from reviewing many of the claims in the instant petition, has conceded that he did not raise many of these claims either at trial or on direct appeal, Petitioner's Response to Order of Court and Reply to Respondent's Answer, filed herein on February 9, 1983, (Petitioner's Reply), 27, but advances arguments that Sykes does not bar federal review in the instant case. These include: (1) that there may not be a procedural rule requiring timely objection in Florida; and (2) that there was no deliberate bypass by petitioner himself of his state court remedies. See Petitioner's Reply 10-14.

These two theories are without merit. First, there is no question that Florida has and enforces a procedural default rule where a motion to vacate initially raises issues which could have and should have been raised on direct appeal. See e.g., Raulerson v. State, 420 So.2d 567 (Fla.

Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. at 87, 97 S.Ct. at 2506.

Hall argues that there is cause and prejudice excusing all of his procedural defaults. He asserts that the cause for his failure to abide by the state procedural rule lies in an alleged ineffectiveness of counsel. Petitioner's Reply 16 - 22. Prejudice, he urges, is demonstrated by the fact that none of the procedural

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1982); and Meeks v. State, 382 So.2d 673 (Fla. 1980). This rule has recently been upheld by the Eleventh Circuit. Ford v. Strickland, 696 F.2d 804, 816 (11th Cir. 1983).

Secondly, the issue of deliberate bypass is irrelevant once a procedural default is found. Even if Hall himself did not deliberately bypass state appellate ruled, "(i)n this Circuit a state prisoner can forego the opportunity to raise constitutional issues in habeas corpus proceedings . . .by merely failing to follow them without showing both cause for the default and prejudice resulting from it. Ford v. Strickland, 696 F.2d at 817.

errors he committed could be considered "harmless" and as a result he was sentenced to death. Id. If both these allegations were accepted,[5] the Court would be required to excuse Hall's procedural default and consider the merits of his otherwise precluded claims. Francis v. Henderson, 425 U.S. 536, 542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976). Accord Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

[6] Petitioner, however, has failed

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5 As noted by the court in Engle v. Isaac, Sykes "stated these criteria in the conjunctive," 456 U.S. at 134 n. 43, and a conclusion of lack of cause moots the inquiry regarding prejudice, or vice versa. See Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983).

to satisfy either prong of the cause and prejudice requirements. Mere allegations of ineffective assistance of counsel do not satisfy the cause requirement.[6] Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983); Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981). If the law were otherwise, mere allegations of ineffective assistance of counsel would suffice to excuse all procedural default rendering the rule a nullity. Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977), cert. denied, 434 U.S. 957, 98 S.Ct. 485, 54 L.Ed.2d 316 (1977).

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[6] Even assuming that where such allegations rise to the level of a Sixth Amendment violation that the cause requirement may be met, see e.g. Huffman v. Wainwright, 651 F.2d 347, 350-52 (5th Cir. 1981) and Washington v. Estelle, 648 F.2d 276, 278 (5th Cir. 1981), this Court has determined that the instant allegations of ineffective assistance of counsel are without merit. See discussion of claim "U" infra pp. 1240-1243.

[7] Having determined that excusable cause for Hall's procedural default, in the state courts does not exist, this Court need not examine the prejudice issue. The Court notes, however, that the argument advanced by petitioner that prejudice may be shown by the fact that he received a sentence of death is, as the State points out, without merit. Petitioner must show "actual and substantial disadvantage infecting the entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 1596, 781 L.Ed.2d 816 (1982). This petitioner has not done. This Court concludes, therefore, that federal Claims D, E, F, and G are precluded from review by this Court.

Claim H

Comparison of his brief on appeal and the instant petition reveals that federal

Claim H-improper prosecutorial remarks during closing argument-was partially raised by petitioner in Issue I of his direct appeal. The Court finds that federal Claims H(1)(a),(b),(c), (d), H(2)(b), and H(3)(a) were all raised by Hall on direct appeal and are properly before this Court under Section 2254(b) for its review on the merits.

Claim H, however, presents several other remarks-H(2)(a), H(2)(c), and H(3)(b)-for federal review which were not included in Issue I of the direct appeal. See Exhibit "A" to State's Response to Petitioner for Writ of Habeas Corpus (Exhibit "A"), Appellant's Brief 15-23.

These remarks were initially raised by Hall in his 3.850 motion and brief. See Exhibit "B" 58-59. The state, in its response, argued generally that all issues which could have been and should have been

raised at the time of trial or on direct appeal should not be considered on the merits in a collateral proceeding. Id. at 134. The state argued specifically that those remarks raised on appeal by Issue I and denied by the Florida Supreme Court should not be relitigated. Id. at 136.

[8] Judge Booth, in ruling on the 3.850 motion, held that the issue of improper prosecutorial remarks had been resolved against Hall on direct appeal and did not consider the merits. Exhibit "B" 600. On appeal, the Florida Supreme Court did not address the merits of Hall's claim of improper prosecutorial remarks. Therefore, this Court concludes that the Florida Supreme Court held[7] that Hall's

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[7] See supra note 3 and accompanying text.

failure to raise Claims H(2)(a), (c) and H(3)(b) on direct appeal constituted a procedural default which precluded collateral review in the state courts. This holding precludes federal review as petitioner has advanced no additional theory of cause and prejudice which would excuse his procedural default as to these claims.[8] Therefore, this Court concludes that federal Claims H(2)(a), (c) and H(3) (b) are precluded from review by this Court. Claims H(1)(a-d), H(2)(b), and H (3)(a) will be considered on the merits later in this Opinion.

Sentencing Phase

Claim I

[9] This claim could not have been

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[8] See supra pp. 1229 - 1230.

raised on direct appeal[9] and was therefore raised properly by the motion to vacate. The State responded on the merits of the claim, Exhibit "B" 136, as did Judge Booth's ruling. Exhibit "B" 599. The Florida Supreme Court specifically discussed the merits of Claim I and denied it as a grounds for vacating Hall's conviction. Hall v. State, 420 So.2d at 873-74. This claim will, therefore, be considered later in the Opinion.

Claim J

This claim raises the issue of whether there was sufficient proof of intent

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9 Claim I challenges the reliance of the trial court on Hall's prior conviction for first degree murder as an aggravating circumstance justifying imposition of the death penalty where that conviction was subsequently reduced to second degree murder. This issue could not have been raised on direct appeal because the reduction in his prior conviction occurred the same day as his direct appeal was denied. See Hall v. State, 403 So.2d 1319 (Fla. 1981).

to kill in order to permit the imposition of the death penalty. Hall relies on Enmund v. Florida, __ U.S. __, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which had not been decided at the time of his direct appeal. Although changes in the law do not mandate collateral review for constitutional claims which were latent at the time of the direct appeal, Engle v. Isaac, 456 U.S. 107, 131, 102 S.Ct. 1558, 1573, 71 L.Ed.2d 783 (1982), this claim was addressed on its merits by the State, Exhibit "B" 136, Judge Booth (who distinguished Enmund and denied the claim), Exhibit "B" 600-01, and the Florida Supreme Court, Hall v. State, 420 So.2d at 874. This Court must, therefore, review the merits and will do so later in this Opinion.

Claims K, L, N, O, Q, R, S, T

These claims all go to aspects of the penalty phase of Hall's trial. They were

raised initially in Hall's 3.850 motion. The State of Florida has consistently argued that these claims have been waived by Hall for failure to raise them at trial or on direct appeal. See Exhibit "B" 137-38 (Response to Motion to Vacate or Set Aside Conviction); Brief of Appellee 2-4, Attachment #2 to Supplemental Memorandum of Law, filed herein on February 28, 1983 (State's Brief on Appeal of the Denial of Post-Conviction Relief); and State's Response to Petition for Writ of Habeas Corpus, filed herein on November 2, 1982. Judge Booth, Exhibit "B" 601-03, and the Florida Supreme Court, Hall v. State, 420 So.2d at 873, held these claims precluded from collateral review.

[10] Hall argues, however, that because both state courts in some way also touched upon the merits of these claims, the State of Florida has waived its

procedural default rule as to these claims. He contends that any discussion of the merits of these claims brings this case within the rule that prohibits a federal court from applying a state timely objection rule where the state court itself has not done so. See, e.g., Francis v. Henderson, 425 U.S. 536, 542 n.5, 96 S.Ct. 1708, 1711 n.5, 48 L.Ed.2d 149 (1976); Grizzell v. Wainwright, 692 F.2d 722 (11th Cir. 1982); Thomas v. Blackburn, 623 F.2d 383, 386 (5th Cir. 1980), cert. denied, 450 U.S. 953, 101 S.Ct. 1413, 67 L.Ed.2d 380 (1981).

This is, however, not necessarily true. In a careful review of the Supreme Court's opinions in those cases where the state courts have appeared to discuss the merits of a claim in conjunction with a ruling of procedural default, the Court of Appeals for the Fifth Circuit determined

that resolution of the issue whether the lower federal court should have reached the merits turned on the Supreme Court's determination of the basis of the state court decision. Ratcliff v. Estelle, 597 F.2d 474, 477-78 (5th Cir.), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979). Where the Supreme Court determined that despite some discussion on the merits, the basis for the state court decision was procedural default, it held that review on the merits by the federal courts was also precluded. Id. (Judge Roney reviewed the Supreme Court's opinion in Newman v. Henderson, supra; Francis v. Henderson, supra; Lefkowitz v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975); and Irvin v. Dowd, 359 U.S. 394, 79 S.Ct. 825, 3 L.Ed.2d 900 (1958).

In Ratcliff itself, Judge Roney found that the state trial court clearly ruled

on procedural grounds, but then went on to briefly discuss the merits of the claims. 597 F.2d at 478. Judge Roney speculated that the trial court had done so in order to dispose of all the issues in the event it was in error on the procedural default. Id.

The state appellate court affirmed without opinion. Judge Roney held that under these circumstances it was reasonable to interpret this affirmance as a holding of procedural default for three reasons. First, the trial court opinion regarding procedural default was unequivocal. Nothing in the subsequent discussion of the merits compromised that holding. Second, it is well settled that a court will not reach a constitutional issue if it can rest its decision on the nonconstitutional grounds. And third, the trial court correctly applied the state law on

the procedural issue. Id. Therefore, having concluded that the state court correctly applied its procedural default rule, Judge Roney held that the district court's dismissal of the petition was correct. Id.

Other federal appellate courts also recognized that a state's procedural default policy should be enforced where that policy is a substantial basis for the state court ruling or where the merits have been addressed only as an alternative holding. See e.g., United States ex rel. Caruso v. Zilinsky, 689 F.2d 435 (3d Cir. 1982); Martinez v. Harris, 675 F.2d 51 (2d Cir 1982), cert. denied, __ US. __, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982); and Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980), cert. denied, 450 U.S. 933, 101 S.Ct. 1395, 67 L.Ed.2d 367 (1981). See also Grizzell v. Wainwright, 692 F.2d at

725 (where state court did not enforce procedural default even as an alternative ground of decision, federal court must also address merits).

In the instant case, the sole comment which Hall points to as a waiver of the procedural default policy is the Florida Supreme Court's fleeting comment after reviewing the merits of Claims I and J that:

> Hall presented the trial court with numerous other points [Claims K, L, N, O, Q, R, S, and T] regarding his sentencing proceeding. As did the trial court, we find no merit to them.

Hall v. State, 420 So.2d at 874. This Court finds it unreasonable to interpret this comment as a rejection and waiver of the trial court's enforcement of the procedural default policy and a holding on the merits of these claims.

On the contrary, in applying Judge

Roney's analysis in Ratcliff to the instant case the court must conclude that Florida enforced its procedural default rule as to these claims. First, both Florida courts unequivocally held that Hall waived Claims, K, N, O, Q, R and S due to procedural default. Exhibit "B" 601-603. Judge Booth's discusion of the merits of these claims probably was intended to foreclose the necessity of future evidentiary hearings on the merits of these claims in anticipation of further efforts by Hall to overturn his conviction -as by a state habeas claim of ineffective assistance of appellate counsel, which subsequently did materialize. It cannot be said that his cursory discussion of the merits in the interests of judicial economy compromises his holding of preclusion as to these claims. To rule otherwise would be to dictate the form of a state

court's determination by choosing not to follow a state ruling of procedural default if the state court also expresses its views on federal constitutional law. This is unacceptable. United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982). Cf. Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir. 1982) (it is sound appellate practice for a state prosecutor to argue in the alternative).

Although Judge Booth did not specifically hold Claims L and T precluded, this is not a case where the state appellate court affirmed without opinion. On the contrary, the Florida Supreme Court specifically held, as this Court has noted throughout this Opinion, that those claims which could have and should have been raised on direct appeal were precluded from collateral review. Since Claims K, L, N, O, Q, R, S, and T could have been

but were not raised on direct appeal, nor discussed on their merits, all of them must be considered to have been unequivocally held precluded by the Florida Supreme Court.[10]

Secondly, there is no reason to suppose that the Florida Supreme Court intended to reach a federal constitutional issue when it did not have to.

Third and last, the Florida courts correctly applied their procedural default

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10 As to Claim R, see Dietz v. Solem, 640 F.2d 126, 131-32 n. 1 (8th Cir. 1981) (any discussion of merits of a claims where no objection at trial must be dicta since it would be based on a hypothetical assumption); as to Claims L and T, see United States ex rel. Caruso v. Zelinsky, 689 F.2d at 439-440 (claims precluded from federal review where state trial court ruled on merits, but state appellate court in affirming found trial court properly denied the claims on both procedural and substantive grounds); as to Claims N, O, Q, R, and S see Hockenbury v. Sowders, 620 F.2d 111, 115-116 (6th Cir. 1980) (substantial basis of state court's decision

rule. See Raulerson v. State, 420 So.2d 567 (Fla. 1982).

This Court holds, therefore, that failure to comply with the State of Florida's procedural default rule was a substantial basis of the Florida Supreme Court's denial of Claims K, N, O, Q, R, S, and T. Finding no excusable cause for these defaults,[11] this Court will dismiss these claims with prejudice.

Claim M

The remarks complained of in federal claims M(1)(b) and (c) were not raised on appeal nor discussed by the Florida

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was procedural default where court held claim precluded and merits review only cursory). See generally Zelinsky, supra at 439-440 for a discussion of why state court reliance on a procedural rule as an alternate holding should suffice to implicate the procedural default doctrine.

[11] See supra notes 4-6 and accompanying text.

Supreme Court in its denial of the 3.850 motion. Therefore, consistent with this Court's prior analysis of the Florida Court's holding,[12] these claims are precluded from federal review absent cause and prejudice. Finding no excusable cause for Hall's procedural default,[13] they will be dismissed with prejudice.

[11] Federal claim M(1)(a)--improper prosecutorial remarks during sentencing argument--was raised on direct appeal as Issue V. In its brief on appeal, the state argued procedural default. See Exhibit "A," Appellee's Brief 43. The Florida Supreme Court apparently agreed, as it did not address the merits of this claim, and it remarked in a footnote that this

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12 Supra note 3 and accompanying text.

13 See supra notes 4-6 and accompanying text.

objection was not raised at trial. Hall v. State, 403 So.2d at 1324 n. 4. Nevertheless, when this issue was again raised by motion to vacate, the state asserted, Exhibit "B" 137, and Judge Booth found, Exhibit "B" 601, that it had been resolved against Hall on direct appeal. It is unclear whether the Florida Supreme Court held it precluded or exhausted on appeal.[14] Therefore, this Court will consider it on the merits later in this Opinion.[15]

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[14] This ambiguity results from the fact that the Supreme Court did not consider the claim on its merits, but arguably the claim could fit into either of the remaining categories--claims raised on appeal or claims precluded.

[15] Where the state does not raise the issue of procedural default and the state court holding is ambiguous, no presumption of preclusion inheres. See Ulster County Court v. Allen, 442 U.S. 140, 152, 99 S.Ct. 2213, 2222, 60 L.Ed.2d 777 (1979).

Claim P

Claim P(2) was raised on direct appeal as Issue V and was denied. Hall v. State, 403 So.2d at 1324-25. It will, therefore, be considered later in this Opinion.

Claim P(1), however, was never raised on direct appeal. See Exhibit "A," Appellant's Brief 37-39. Although the State did not point this out in its brief on appeal of the 3.850 motion,[16] See Attachment #2 to Supplemental Memorandum of Law filed herein on February 28, 1983, at 3, the Florida Supreme Court did not reach the merits and this Court finds that the most reasonable interpretation of this silence is that the court held that Claim P(1) was precluded from collateral

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16 The state by Supplemental Response, filed herein on February 28, 1983, now argues that this claim is precluded.

review.[17] Finding no excusable cause for Hall's procedural default,[18] this Court will likewise not consider the merits of Claim P(1) and will dismiss it with prejudice.

Claim U

Claim U was not presented on direct appeal, but raised initially by 3.850 motion. It was considered on the merits by the Florida Supreme Court and denied.[19]

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[17] Ulster County does not mandate a different result as Claim P(1), unlike Claim M(1)(a), was not raised on direct appeal. Therefore, under the Florida Supreme Court's categorization of the 3.850 claims, Claim P(1) must be put in the precluded category.

[18] See supra notes 4-6 and accompanying text.

[19] The Florida Supreme Court may well have found a deliberate by-pass and have refused to consider this claim on appeal of the 3.850 motion since Hall's counsel refused to present evidence on this claim at the trial court's evidentiary hearing on the motion. See Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

Hall v. State, 420 So.2d at 874. This Court will consider it herein.

Claim V

Claim V was raised by state habeas. The Florida Supreme Court consolidated the habeas petition with the appeal on the motion to vacate and resolved the issue against Hall on the merits. 420 So.2d at 874. This Court will consider the merits herein.

Claims W, X and Y

These claims were expressly held precluded by Judge Booth. Exhibit "B" 604. The Florida Supreme Court also enforced the procedural default rule and did not address their merits. Finding no excusable cause for the procedural default,[20] this Court holds that they are precluded

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[20] See Supra notes 4-6 and accompanying text.

from federal review and will dismiss Claims W, X, and Y with prejudice.

Claim Z

[12] This claim was exhausted by way of a class-action state habeas petition of which petitioner was a member, and was resolved against the class. See Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). Accordingly, it will be considered herein.

Summary

In summary, this Court finds the following to be the procedural posture of the twenty-six federal claims raised by the instant habeas petition:

Precluded Claims: D; E; F; G; H(2)(a), (c); H(3)(b); K; L; M(1)(b), (c); N; O; P(1): Q; R; S; T; W; X; Y

Exhausted Claims:

1. By direct appeal: B; C; H(1)(a)-(d); H(2)(b); H(3)(a); M(1)(a): P(2)

2. By 3.850 motion: A; I; J; U

3. By state habeas petition: V; Z

IV: MERITS OF EXHAUSTED CLAIMS

By Direct Appeal

Claim B

Hall claims that this trial was rendered fundamentally unfair in violation of the fifth and fourteenth amendments by the admission of evidence of a collateral offense. He contends that this evidence dominated his trial for the instant conviction resulting in such severe prejudice as to violate his rights under the fifth, sixth and fourteenth amendments to the United States Constitution.

[13] It is fundamental that federal courts possess only limited authority to consider state evidentiary rulings in a

habeas proceeding by a state prisoner. Burgett v. Texas, 389 U.S. 109 , 113-14, 88 S.Ct. 258, 260-61, 19 L.Ed.2d 319 (1967). A violation of state evidentiary rules does not in and of itself invoke § 2254 habeas corpus relief. Bryson v. State of Alabama, 634 F.2d 862, 864-65 (5th Cir. 1981). The federal courts' inquiry is limited to an examination of whether federally guaranteed rights have been violated. Nordskog v. Wainwright, 546 F.2d 69, 72 (5th Cir. 1977). Only where the admission of certain evidence is so prejudical as to constitute a denial of fundamental fairness will federal courts intervene. Id.

[14, 15] This Court is bound by a state court's determination of its own law. Hall v. Wainwright, 493 F.2d 37, 39 (5th Cir. 1974). Under Florida law, evidence of the commissions of "collateral

crimes" is admissible if relevant to an issue being litigated. Identity is recognized as a legitimate relevant issue. Williams v. State, 110 So.2d 654 (Fla. 1959). The Florida Supreme Court found this evidence relevant to the issue of identity and to show the general context of the Hurst murder, Hall v. State 403 So.2d at 1324. The evidence was, therefore, properly admitted under Florida law at Hall's trial.

[16] In the context of the entire trial of this case, this Court cannot conclude that the evidence of the collateral crime was so ovewhelmingly prejudicial that the state court nonetheless committed error in admitting it. After reviewing the entire transcript, this Court cannot conclude that this evidence so dominated the trial as to render it fundamentally unfair.

Accordingly, this claim will be denied

Claim C

This claim raises the issue of whether the evidence was sufficient to convict Hall of first degree murder. Hall contends that there was not sufficient evidence to prove beyond a reasonable doubt that he intended to kill Karol Hurst. Therefore, he contends that his conviction and death sentence denied him due process and subjected him to cruel and unusual punishment in violation of the fifth and fourteenth amendments.

Hall and Mack Ruffin were indicted for the murders of Karol Hurst and Deputy Sheriff Lonnie Coburn. Hall was tried separately for the Hurst murder.

On February 21, 1978, Mrs. Hurst, a 21-year-old housewife who was seven months pregnant, left a Pantry Pride checkout

counter in Leesburg, Florida, at 3:00 p.m. Her body was found at 3:00 p.m. on February 22, 1978, in Sumter County. She had been shot and sexually assaulted. In a confession introduced at trial, Exhibit "A," Transcript of Trial (Tr.) 528-35 Hall told a deputy sheriff how, on the previous day, he and Ruffin had sat in that Pantry Pride parking lot looking for a car to use in committing a robbery when he, Hall, accosted Mrs. Hurst and forced her into her car. Hall slid in behind the steering wheel and drove while Ruffin followed in his own car. They stopped in a wooded area where, according to Hall, Ruffin beat, sexually assaulted, and shot Mrs. Hurst.

At trial, the state presented the case to the jury on the theory that Hall and Ruffin did everything together. They

planned the robbery together and drove together to the Pantry Pride parking lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car.[21]

This evidence is legally sufficient to withstand attack under Section 2254 if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

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21 This summation of the facts comes from Hall v. State, 403 So.2d at 1323. See Ruffin v. State, 420 So.2d 591, 595 (Fla. 1982), for Justice McDonald's dissent in which he would have reduced Ruffin's conviction because the evidence showed Hall had instigated the crime and killed Mrs. Hurst.

reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

In order for Hall to be found guilty of first degree murder under Florida law, the state must prove that he either pulled the trigger with a "premeditated design to effect the death of the person killed," Fla. Stat. §782.04(1)(a) (1973) or, that he was a principal to the crime of first degree murder even if he did not physically pull the trigger. Fla. Stat. §777.011 (1977) states:

> [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

[17] An aider and abettor is

responsible for all acts committed by his accomplice in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973).

[18] The evidence in this case shows that either Hall or Ruffin killed Mrs. Hurst. A premeditated design to effect the death of a human being is a "fully formed and conscious purpose to take human life." McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957). As the issue of premeditation necessarily involves the state of mind, circumstantial evidence must be relied upon by the jury in resolving the issue. See Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Facts and circumstances from which a jury may lawfully infer premeditation include, among other things, the

method by which death is effected, the nature and manner of the wounds inflicted and the actions of the accused prior to and subsequent to the homicide. Larry v. State, 104 So.2d 352 (Fla. 1958).

[19] There is ample evidence in the record of this case for the Court to hold as a matter of law that a rational trier of fact could have found beyond a reasonable doubt that Mrs. Hurst was killed with a premeditated design by either Hall or Ruffin to avoid subsequent identification of them by her. The evidence is also legally sufficient for a jury to find that the other was an aider and abettor and, therefore, a principal to the first degree murder.

Accordingly, this claim will be denied.

Claim H

Claim H charges that the prosecutor

improperly commented on Hall's failure to testify, appealed to the sympathy of the jury and argued matters not supported by any evidence. Hall alleges that these comments denied him due process of law and deprived him of a reliable determination of guilt in a capital trial as required by the sixth, eighth, and fourteenth amendments to the federal constitution.

As noted above, only the statements objected to in claims H(1)(a)-(d), H(2)(b) and H(3)(a) are properly before this Court.[22] These claims will be considered individually and then in their cumulative effect in the context of the entire trial. See Cronnon v. State of Alabama, 587 F.2d 246, 251 (5th Cir.), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 792 (1979).

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[22] See supra pp. 1230 - 1231

H(1)(a):

[20] At the beginning of his closing argument, the prosecutor pointed to Hall and said:

> Now, first the evidence shows us that this defendant sitting right over there, and he's asleep, ... [emphasis added]

Exhibit "A," Tr. 604.

Hall contends that this was an improper comment on his failure to testify. It is reversible error to do so, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); see also United States v. Brown, 546 F.2d 166 (5th Cir. 1977), but this Court cannot agree that the prosecutor intended to do so. See Frank v. Blackburn, 605 F.2d 910, 914 (5th Cir. 1979), vacated in part on other grounds, 646 F.2d 873 (5th Cir. 1980), modified, 646 F.2d 902 (5th Cir. 1981). This was not a comment on Hall's failure

to testify. Accord Hall v. State, 403 So.2d at 1324. Rather it was a comment on Hall's general demeanor. While this Court agrees with the Florida Supreme Court that the comment may have improperly implied a lack of interest in his own trial, id., it was not of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. Frank v. Blackburn, 605 F.2d at 914. Therefore, this comment did not render the trial constitutionally defective

H(1)(b)(c) and (d):

[21] These remarks,[23] Hall

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23 The prosecutor said:

> (b) So what happens then? Here we come into something that's important. Who says that Ruffin killed her? I wasn't there. Karol Hurst is dead. Appendix "A," Tr. 607.

asserts, also improperly referred to his failure to testify. Hall maintains that the remarks challenged him to submit his own version of the facts of the crime, thereby reinforcing the fact that he did not testify during the trial.

The Court, however, agrees with the State of Florida that these remarks were well within proper prosecutorial advocacy and merely urged the jury to reject the defense theory that Hall was not culpable for the actions of Ruffin. These remarks were not comments upon Hall's failure to

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(c) This man admits all of it. The only thing he is saying is, he is saying, "I did everything but I didn't kill her, I didn't have anything to do with that. 'That's the big thing, that's the biggie, that's what he is saying." Appendix "A," Tr. 609.
(d) Now, this is a tragic case. We have a deceased woman, she can't testify. Appendix "A," Tr. 610.

testify and did not, therefore, render Hall's trial fundamentally unfair.

H(2)(b):

Hall alleges that this comment[24] impermissibly appealed to the sympathy of the jury to his detriment. The Court does not agree.

[22] In reviewing prosecutorial remarks for prejudice to a state defendant, a federal court inquiry is limited to whether the remarks were so prejudicial as to render the trial fundamentally unfair as a matter of federal constitutional law. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). It is not enough that the prosecutor's remarks were undesirable or even

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24 "Now, this is a tragic case. We have a deceased woman; she can't testify. I don't know how quick death comes to people; I know some die hard; some die easy. It comes to all of us sooner or later." Appendix "A," Tr. 610.

universally condemned. Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980). A defect of constitutional proportion is not to be found in any but egregious cases. Houston v. Estelle, 569 F.2d at 382.

[23] Several factors should be considered in evaluating prosecutorial misconduct in a habeas case: (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused. Hance v. Zant, 696 F.2d 940, 950 n. 7 (11th Cir. 1982). Application of these factors leaves no doubt that the challenged remark does not rise to the level of constitutionally improper conduct, and this Court so finds.

Claim H(3)(a):

Hall complains that the prosecutor referred on more than one occasion to items not in evidence. While the process of constitutional line-drawing as to prosecutorial misconduct may be imprecise, Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), there can be no doubt that these remarks do not state a constitutional claim requiring relief under Section 2254.

Cumulative Impact on Remarks

Having reviewed each challenged remark and finding them within the constitutional parameters of prosecutorial advocacy, the Court has considered their cumulative impact in the context of the entire trial, Cobb v. Wainwright, 609 F.2d at 755 n. 1, and finds that the asserted errors are not of constitutional magnitude. Houston v. Estelle, 569 F.2d at 377-78 n. 8.

Accordingly, claims H(1)(a)-(d), H(2)(b) and H(3)(a) will be denied.

Claim H(1)(a)

[24] This claim also challenges a remark by the prosecutor. This remark occurred during closing argument at the end of the penalty phase of the trial.[25] Although the interjection by the prosecutor of his personal opinion on the lack of mitigating circumstances in Hall's case might be reversible error under Florida law, see Tyson v. State, 87 Fla. 392, 100 So. 254 (Fla. 1954), and even reversible error in an appeal from a federal criminal case, United States v. Corona, 551 F.2d 1386, 1389 (5th Cir. 1977), it may not be sufficient error to mandate relief under

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25 "Ladies and gentlemen of the jury, with all due sincerity, I don't see any mitigation in this particular case." Appendix "A," Tr. 693.

Section 2254. A prosecutor's conduct may be improper without being unconstitutional. Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1982).

[25] In the instant case, the Court agrees with the State of Florida that the remark is merely a comment on the weakness of the evidence in mitigation. But even if it were not, this remark would not rise to the level of constitutional error under Hance.

Accordingly, this claim will be denied.

Claim P(2)[26]

Hall asserts that the trial court failed to consider relevant mitigating circumstances thereby rendering his death sentence arbitrary and capricious in

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26 P(1) has been previously determined to have been precluded. Supra p. 1234.

violation of the eighth and fourteenth amendments. THe basis for this claim apparently is that certain of Hall's own testimony during the penalty phase[27] was, as a matter of law, sufficient to prevent the imposition of the death penalty. Cf. Fla.Stat. §921.141(6)(b) and (f) (1977).

[26] This, of course, is not the law. The sentencing judge must consider in mitigation any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). It is

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27 A [Hall] I was high when this taken place, I wasn't drunk, I was high, and I'm sorry to say I really didn't want no one to get killed in this case, but it happened this way. I'm sorry it happened this way.

clearly within the province of the sentencer to determine the weight to be given to evidence of relevant mitigating circumstances. Id. 102 S.Ct. at 875. In some instances, such evidence may properly be given little weight. Id. 102 S.Ct. at 876.

[27] The fact that Judge Booth did not find that the evidence of Hall's ingestion of drugs and alcohol was

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Q. All right. Did he do anything to indicate whether or not he understood what you were saying to him?
A. He said he did, or he indicated that he did.
Q. In what way did he indicate he understood?
A. I don't recall; he said, "Yeah," or something like that.
Q. All right. Will you describe, please, the lighting and weather conditions at the time?
A. It was fairly chilly. It was pretty cold. It was clear, it wasn't raining. The only light that I recall having at the time was the light from the Lykes-Pasco Packing Comnpany.

sufficient to substantiate a finding of mitigation under the statutory factors[28] does not indicate that he gave the evidence no weight at all. The law only requires that the defendant be permitted to present evidence in mitigation, and requires the sentencer to listen. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This Court concludes

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Q. How was the person dressed?
A. He had on a pair of dark checked slacks, and no shirt and no shoes.
4. None of the prosecutor's remarks were objected to at the time.
A. That's right. All right, also, if I had been . . . I was high, like I said, they had it in the paper, we had been smoking some dope and drunk some beer and bought a pint of brandy.
Q. So you had been smoking dope?
A. Right, that night.
Q. What kind of dope were you smoking?
A. Some kind of pot, grass.
Q. And some pills, what kind of pills were you taking?
A. I got some the pills from Ruffin.

28 Appendix "A," Record on Appeal 351.

as a matter of constitutional law that the trial court could have reasonably found that this testimony did not establish the statutory mitigating factors.

Accordingly, this claim must be denied.

By 3.850 Motion:

Claim A

Hall claims that he was not presented during a portion of the jury selection and certain other times during a trial and that his absence abrogated his fundamental constitutional right to be present at all stages of a criminal trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); Francis v. State, 413 So.2d 1175 (Fla. 1982) (fundamental right to be present during the actual jury selection).

The Florida Supreme Court found that Hall was present during the actual voir

dire and selection of the jury. Hall v. State, 420 So.2d at 873. The record supports this finding of fact, Appendix "A," Tr. 1-248, and this Court defers to it. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Hall, however, urges that his fundamental rights were violated by his absence during (1) the general qualification of jurors; (2) a discussion on various legal motions, Appendix "A," Tr. 69-72; (3) his counsel's stipulation to the excusal of an alternate juror; (4) the marking for identification of an exhibit; (5) the release of the remaining alternate juror at the end of the guilt phase; (6) the trial court's discussion with the jury their request for certain items of evidence during deliberations; and (7) the trial judge's dismissal of the jury.

[28] The trial court and the Florida

Supreme Court found Francis distinguishable in that Hall was present at all critical stages of the proceedings and was able to consult with his counsel. This Court agrees. The defense agreed that prior move could take place in his absence, Appendix "A," Tr. 99-101, and even in the absence of such agreement there would be no constitutional infirmity in this procedure. Cf. Howard v. Kentucky, 200 U.S. 164, 26 S.Ct. 189, 50 L.Ed.421 (1906). Hall's absence during the discussion of legal motions is not a constitutional violation. United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970); Cf. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). Likewise, none of the other absences occurred at times which would jeopardize Hall's right to due process of law; nor did they result in any injury to his substantial rights.

See Howard v. Kentucky, supra.

Accordingly, this claim will be denied.

Claim I

[29] Hall claims here that because the Florida Supreme Court reduced his sentence for the murder of Coburn from first to second degree murder, Hall v. State, 403 So.2d 1319 (Fla. 1981), the Coburn conviction should not have been used to show the aggravating circumstance of prior criminal history. Hall alleges that this error deprived him of his rights under the eighth amendment to a fair and reliable determination of his penalty.

This claim is without merit, however, as the conviction itself, regardless of the degree, still meets the statutory criteria for an aggravating circumstance. Fla.Stat. §921.141(5)(b) merely requires that the defendants have been "previously

convicted of another capital felony or of a felony involving the use or threat of violence to the person." Furthermore, Hall's 1968 conviction for assault with intent to commit rape was before the trial court and could have been in and of itself sufficient to find the existence of this aggravating circumstance.

Accordingly, this claim will be denied.

Claim J

Hall claims the death penalty shouldn't have been imposed on him because there was no proof that he killed or intended to kill. Enmund v. Florida, __ U.S. __, 102 S .Ct. 3368, 73 L.Ed.2d 1140 (1982) (death penalty unconstitutional where the conviction for first degree murder is for a a homicide committed during the perpetration of a felony without proof of intent to kill).

Enmund, however, is inapplicable to the facts of this case. In Enmund, the defendant was not present at the scene and the killing was not found to be premeditated.

In the instant case, this Court has already determined that the evidence was sufficient to permit the jury to find the elements of first degree murder, including intent, as to Hall himself and beyond any reasonable doubt.[29] Therefore, this claim is without merit and will be denied.

Claim U

This claim raises the issue of ineffective assistance of trial counsel. Hall charges his counsel with twenty-six counts of ineffective assistance during the guilt and sentencing phases of the trial. The

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29 See discussion of Claim "C" supra pp. 1235-1237.

first allegation--ineffective assistance during jury selection--contains eleven specific instances.

The Court notes initially, that, at the state evidentiary hearing on the 3.850 motion, Hall had both of his trial attorneys present, but chose not to question them. Hall's 3.850 counsel, in fact, refused to submit any evidence in support of this claim. He stated for the record that, "I choose to [not put on any testimony] as a matter of tactics at this time." Appendix "B," 536. As the Florida Supreme Court noted in its review of these claims, Hall "evidently [chose] to let a cold record speak for itself." Hall v. State, 420 So.2d at 874. Judge Booth in his order denying the ineffective trial counsel claim, specifically found that Hall deliberately chose to offer no evidence from his trial counsel for either

tactical or strategical reasons, Appendix "A," Record on Appeal (R) 603, and found that the allegation failed for lack of any proof under the standard of Knight v. State, 394 So.2d 997 (Fla. 1981)

[30] A federal habeas petitioner must make a showing of two elements in order to obtain an evidentiary hearing based on the assertion that material facts were not adequately developed at the state-court proceeding: first, that a fact pertaining to his federal constitutional claim was not adequately developed at the state-court hearing and that the fact was "material" or crucial to a fair, rounded development of the material facts; and, second, that failure to develop that material fact at the state's proceeding was not attributable to petitioner's inexcusable neglect or deliberate by-pass. Thomas v. Zant, 697 F.2d 977, 986 (11th

Cir. 1983).

In the instant case, counsel's testimony concerning trial stategy is certainly a material fact to the allegation of ineffective assistance of counsel. Washington v. Strickland, 693 F.2d 1243, 1254 (5th Cir. 1982) (Unit B en banc). However, the record herein contains specific findings by Judge Booth of deliberate bypass of the state-court opportunity to develop that material fact, and an admission by Hall's counsel that he bypassed his opportunity for tactical reasons. This Court finds as a matter of law, therefore, that Hall "deliberately bypassed" his opportunities for an evidentiary hearing on this point. A state prisoner who knowingly and deliberately bypasses state procedures intentionally relinquishes known rights. Fay v. Noia, 372 U.S. 391, 438-39, 83 S.Ct. 822, 848-49, 9 L.Ed.2d 837 (1963); Thomas

v. Zant, 697 F.2d at 989.

[31] Furthermore, even if Hall had not refused to adduce evidence in support of his claim, Judge Booth made detailed and exhaustive findings of fact on the competency of Hall's trial counsel, which the Court may, within its discretion, adopt without affording Hall any further opportunity to produce evidence. See Ford v. Stickland, 696 F.2d at 825 n. 1 (Tjoflat, J., concurring). Therefore, no federal evidentiary hearing was required on this claim.[30] Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983).

[32] In reviewing ineffective assistance of counsel claims, the courts do not

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30 Hall's counsel never moved for an evidentiary hearing on this claim, but, even if he had, the Court would have denied the motion as to the claims of ineffective assistance of counsel for the foregoing reasons.

sit to second guess considered professional judgments with the benefit of 20/20 hindsight. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). It is well settled that the standard to be applied in evaluating ineffective assistance of counsel claims is whether counsel was "reasonably likely to render and did render reasonably effective assistance of counsel." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), adhered to en banc, 289 F.2d 928 (5th Cir.), cert. denied, 368 US. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). Whether counsel has rendered adequate assistance is a mixed question of law and fact that requires the application of legal principles to the historic facts of the case. Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.22d 333 (1980);

Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982). The assistance rendered must be evaluated from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to counsel at that time. Proffitt v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982) Even where an attorney's stategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. Baty v. Balkcom, 661 F.2d 391, 395 n. 8 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982).

The Court notes again that Judge Booth made detailed findings of fact as to the level of competency of Hall's trial counsel. After reciting his general familiarity with these attorneys' work--both in the instant case and in general--Judge

Booth stated that he "has always found both men to be well prepared, able, thorough, effective and competent attorneys." Appendix "A," R. 603. Furthermore, he noted that "[i]n their capacity as Assistant State Attorneys they both assisted [the prosecutor in this case] in murder cases thus acquiring a wealth of background knowledge regarding that prosecutor's tactics and strategies which furnished each one with one unique advantage which few other counsel have. Id. In its review of the 3.850 motion, the Florida Supreme Court affirmed these findings of fact by the trial court as to the effectiveness of counsel at Hall's trial. 420 So.2d at 875. This Court defers to the state court's factual findings as to the training, experience, and general competence of Hall's counsel. Sumner v. Mata, 449 U.S. 539 , 101 S.Ct. 764, 66 L.Ed.2d

722 (1981).

Furthermore there is nothing in the record which would, as a matter of law, support Hall's claim of constitutionally defective trial representation.

Guilt Phase

The record shows that trial counsel obtained two changes of venue, Appendix "A," R. 13-17; R. 205-207 a severance from the co-defendant, id. at 11; and filed a Motion to Suppress Admissions, id. at 217-18. The record indicates that defense counsel were vigilant during jury selection process, Appendix "A," Tr. 1-242, and certainly not below sixth amendment standards. Although present counsel suggests many things which could have been done differently during jury selection, this is insufficient to mandate relief under Section 2254. Hall had a right to reasonably effective counsel, not errorless counsel.

Adams v. Balkcom, 688 F.2d 734 (11th Cir. 1982); Washington v. Watkins, 655 F.2d 1346, 1367 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

Sentencing Phase

[33] The allegation that counsel were ineffective because they failed to present any evidence in mitigation during the sentencing phase is also without merit. Hall himself testified in an effort to persuade the jury that Ruffin was the instigator of the crime, id. at 660-65, and counsel argued Hall's cooperation with police in mitigation. Id. at 695. Furthermore, the decision not to present any other live witnesses is a tactical decison precluding cross-examination of those witnesses which the Court will not second guess. Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980).

[34] Finally, failure to present any additional evidence at the penalty stage does not constitute per se ineffective assistance of counsel. Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983). Such a strategy may well be based upon a professional assumption as to the likelihood of success of such evidence. When counsels' assumptions are reasonable under all the circumstances, counsel need not present all arguably mitigating factors. Id. at 965. In this case, the Court assumes that counsel's assumptions were reasonable as Judge Booth has attested to the general competency of counsel and there is nothing in the record to suggest that these assumptions were not reasonable.

Hall also asserts that his trial counsel did not sufficiently investigate Hall's background, including his mental

history and his character. Hall does not, however, proffer any specific evidence of mental disorder or character in support of this claim.

[35] While there is a duty to conduct a reasonable pretrial investigation into possible defenses and theories of mitigation, Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc), Hall must show not only that no reasonable investigation was conducted, but also that his counsel's ineffectiveness caused actual and substantial prejudice to his case. Id.

Furthermore, the scope of counsel's duty to investigate cannot be separated from the rule that counsel is not required to present to the jury any even arguably mitigating evidence that might exist. Stanley v. Zant, 697 F.2d at 965. Where counsel decides that such evidence would

be of little persuasive value, counsel may make a strategic judgment to present less than all possible evidence in mitigation. Id.

In the instant case, the claim that Hall's trial counsel did not conduct a reasonable investigation is made only upon "informations and belief," and there is nothing in the record which supports it. The failure of Hall to call his trial counsel to testify at the 3.850 hearing was a deliberate bypass of Hall's opportunity to develop facts in support of this claim. Accordingly, it must fail for lack of proof. Hall has not met his burden on the threshold issue of ineffectiveness here. See id. at 1250-51.

Hall's allegation that counsel erred in failing to object to the trial judge's instructions allegedly limiting the mitigating circumstances which the advisory

jury might properly consider to those in the statute is likewise without merit. The judge not only permitted argument on non-statutory factors (Hall's cooperation), but nothing in his instructions to the jury would require this Court to conclude that a reasonable juror might interpret the instruction to limit consideration of mitigating circumstances in those in the statute. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Cf. Ford v. Strickland, 696 F.2d at 812 (finding an almost identical instruction would not be so interpreted by a juror).

[36] The failure to object to this instruction by Hall's counsel did not rise to the level of a sixth amendment violation. Absent such a conclusion, it is "not for federal courts to speculate as to

the possible reasons for failure to object." Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981).

A careful review of the entire transcript of the trial reveals that none of the other instances pointed to by Hall justify the conclusin that his trial representation was ineffective. This claim will be denied.

Claim V

The major argument advanced in support of Hall's claim of ineffective assistance of appellate counsel is their failure to raise the Lockett issue--improper limitation of the mitigating factors--on appeal. Hall charges that this failure was "inexcusable" due to the trial court's "explicit limitation of consideration of mitigating circumstances."

Having previously found that the

trial court did not explicitly limit the jury's consideration to statutory factors,[31] this Court also concludes that failure to raise this ground on appeal was not error of constitutional magnitude. See United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

Likewise, having determined that Hall's infrequent absences from the courtroom during jury selection did not violate his constitutional rights, [32] appellate counsels' failure to raise this ground on appeal also does not constitute ineffective representation.

The Brief on Appeal shows that appellate counsel raised and vigorously argued five points on direct appeal. Exhibit

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[31] See discussion of Claim "U" supra pp. 1240-1243.

[32] See discussion of Claim "A" supra pp. 1239-1240.

"A," Brief of Appellant. Contrary to assertions in the instant petition that appellate counsel did not raise the issue of improper prosecutorial appeals to the sympathy of the jury, counsel did so argue. Id. at 12-22. Counsel cannot be faulted for not raising every conceivable argument on appeal. For example, Hall's argument that appellate counsels' failure to move for a rehearing based upon the Florida Supreme Court's reversal of the Coburn conviction is patently spurious as the Supreme Court's opinions in the Coburn case and the Hurst case were handed down the same day and the court obviously knew that it had reduced the degree of the Coburn conviction while affirming the Hurst first degree murder conviction. Such allegations cannot successfully support an ineffective assistance of appellate counsel claim.

Finding ample evidence in the record that Hall's appellate counsel rendered "reasonably effective assistance of counsel," this Court will deny this claim.

Claim Z

Hall claims that his rights under the fifth, sixth, eighth, and fourteenth amendments have been abrogated by the Florida Supreme Court's review of ex parte, nonrecord information prior to their appellate review of his death sentence. This claim was resolved against Hall in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), a class-action state habeas proceeding. Hall's assertion of the same issue here runs afoul of the holding of the Eleventh Circuit that the Supreme Court of Florida did not rely on that nonrecord material in

the review of Hall's appeal.[33] Ford v. Strickland, 696 F.2d at 811. See also Brown, 392 So.2d at 1333.

For the foregoing reasons, it is

ORDERED:

1. That Claims D; E; F; G; H(2)(a), (c); H(3)(b); K; L; M(1)(b), (c); N; O; P(1); Q; R; S; and T; W; X; Y raised in the Petition for Writ of Habeas Corpus by a Person in State Custody, filed herein on September 30, 1982, are dismissed with prejudice.

2. That Claims A; B; C; H(1)(a)-(d); H(2)(b); H(3)(a); J; M(1)(a); P(2); U; V; and Z raised in the Petition for Writ of Habeas Corpus by a Person in State Custody, filed herein on September 30, 1982, are denied.

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[33] There has been no allegation that Hall's case was treated differently from the other petitioners in Brown. See Ford v. Strickland, 696 F.2d at 811.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FREDDIE LEE HALL,

Petitioner,

vs. Case No. 82-195-Civ-OC-14

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, et al.,

Respondents.

OPINION AND ORDER DENYING
PETITION FOR REHEARING

This case is before the Court upon Petition for Rehearing, filed herein on May 26, 1983. A response was filed by the State of Florida on May 29, 1983. Before ruling on the petition, the Court will review the history of this case.

I. HISTORY OF PROCEEDINGS

On September 30, 1982, a Petition for Habeas Corpus was filed by defendant herein. A general request for an evidentiary hearing was

included in the prayer for relief of that petition. No grounds in support thereof were cited. On October 8, 1982, this case was transferred to the undersigned for all further purposes and proceedings.

On January 21, 1983, this Court ordered further briefing on the issues raised by the petition for habeas corpus. In his response to that order, petitioner filed a memorandum in which he asserted that he would be filing "additional pleadings requesting an evidentiary hearing on the issue of "cause" and "prejudice" with regard to ineffective assistance of trial and appellate counsel." Petitioner's Memorandum of Law, filed February 9, 1983, at 39.

Petitioner filed no further pleadings for three months. On May 17, 1983, the Clerk of Court received a Motion for Evidentiary Hearing. As the accompanying memorandum of law was not in compliance with Local Rule 3.01(c), the Clerk's Office returned the memorandum to

petitioner that day. Because the motion was no longer accompanied by a memorandum of law as required by Local Rule 3.01(a), it too was returned unfiled and undocketed by the Clerk's Office.

On May 18, 1983, the Court entered its Opinion and Order denying the Petition for Writ of Habeas Corpus and on May 19, 1983, the case was dismissed.

On May 19, 1983, the Clerk's Office received a Motion for Leave to File Expanded Memorandum of Law. As the motion was now moot in light of the entry of the Court's dismissal of the case, the Court denied the motion but granted petitioner leave to file a motion for rehearing in which context a renewed motion for an evidentiary hearing would be appropriate.

On May 26, 1983, the instant Petition for Rehearing was filed. As grounds therefore, petitioner asserts that the case should be reopened due to the need for an evidentiary

hearing on four issues raised by the Petition for Habeas Corpus:

(a) The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, including but not limited to geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, and the race of the victim, in violation of the eighth and fourteenth amendments to the United States Constitution (Issue T in federal habeas corpus petition);

(b) Mr. Hall was denied the effective assistance of counsel at the guilt and penalty phases of his capital trial, in violation of his rights under the sixth, eighth and fourteenth amendments to the Constitution of the United States (Issue U in federal petition);

(c) Mr. Hall was deprived of the effective assistance of counsel on appeal, in violation of his rights under the sixth, eighth and fourteenth amendments to the Constitution of the United States (Issue V in federal petition);

(d) The Supreme Court of Florida's practice, unauthorized and unannounced by statute or rule, of requesting

> and receiving ex parte information concerning appellants in pending capital appeals, without notice to these appellants or their attorneys, denied death-sentenced appellants, including Mr. Hall, due process of law, the effective assistance of counsel, and the right of confrontation and subjected them to cruel and unusual punishment and to compulsory self-incrimination, in violation of the fifth, sixth, eighth and fourteenth amendment (Issue Z in federal petition).

Petitioner contends that no hearing was held on any of these claims in the state proceedings, and has attached the Motion for Evidentiary Hearing and Memorandum of Law which he previously attempted to file. Petitioner also filed a Motion for Stay of Execution which the Court denied as both moot and premature inasmuch as the previous death warrant in this case has elapsed from the passage of time, and no new warrant has been signed. See Order entered herein on June 3, 1983.

The Court will review the Motion for Evidentiary Hearing and accompanying memorandum

attached to the Petition for Rehearing in order to rule on the petition. If no evidentiary hearing is required, the Petition for Rehearing will be denied as the need for a hearing is the sole ground upon which the petitioner asserts this case should be reopened. Therefore, the Court has considered whether this case should be reopened for the purpose of holding an evidentiary hearing on the four claims which petitioner maintains require such a hearing.

II. ANALYSIS OF THE MERITS OF THE MOTION FOR EVIDENTIARY HEARING

Petitioner asserts that an evidentiary hearing is mandatory on the four claims cited above. Although each of these claims was before the state court when it held an evidentiary hearing on his 3.850 motion, petitioner asserts that no hearing was held. He argues that his counsel did not have sufficient time to take depositions, confer with petitioner's

trial and appellate counsel or to discover other relevant facts. When petitioner's counsel was offered the opportunity to present evidence at the 3.850 evidentiary hearing, he refused stating he was not prepared to call witnesses at that time. See Transcript of hearing on Motion to Vacate Conviction, held before the Honorable John W. Booth, Exhibit "B" to State's Response to Petition for Writ of Habeas Corpus, filed herein on November 2, 1982 (Exhibit "B"), at 515-17. Consequently, petitioner maintains that no evidentiary hearing was held on these claims. He further argues that for this Court to hold that his refusal to offer evidence in the state-court proceeding constitutes a waiver of his right to an evidentiary hearing in this case would be manifestly unjust.

Petitioner also points out that this Court has the power to order an evidentiary hearing, even if the state hearing had been adequate. He argues that as to issue "a" (the arbitrary

application of the death penalty due to various factors), there is "a wealth of significant new social scientific research which has been completed or is presently nearing completion --none of which was available at the time of petitioner's state habeas proceedings . . ." which the Court should exercise its power to hear. Petitioner urges the Court to hear the testimony of Professor Linda Foley, of the University of North Florida, who compiled the statistics relied upon by petitioner in this claim. Professor Foley, however, has left the United States for Europe. Petitioner suggests that the court delay holding an evidentiary hearing until Professor Foley returns to this country and has the opportunity to prepare such testimony. Professor Foley, however, does not return to this country until late 1983.

The issue before the Court is whether an evidentiary hearing on the four issues cited by petitioner is mandatory in this case. As

petitioner correctly states, the first prerequisite of the right to a hearing is that the habeas corpus petition allege facts which, if proved, would entitle the petitioner to relief. Guice v. Fortenberry, 661 F.2d 496, 503 (5th Cir. 1981); Rutledge v. Wainwright, 625 F.2d 1200, 1205 (5th Cir. 1980), cert. denied, 450 U.S. 1033 (1981). In the instant case, petitioner's assertion that issues "a" and "d" require an evidentiary hearing is without merit as petitioner has alleged no facts which, if proved, would entitle him to relief.

Issue "a":

This Court has previously ruled that issue "a"--the arbitrary imposition of the death penalty due to socio-economic variables--is precluded from federal habeas review. Opinion and Order entered herein on May 18, 1983, at 17-22. This conclusion of law rested upon this Court's prior finding that the Supreme Court of Florida had held that petitioner had procedurally

defaulted his right to raise this claim on a collateral review in the state courts. See Hall v. State, 420 So.2d 872, 873 (Fla. 1982). This Court further found that petitioner had neither alleged nor established any facts which would excuse this failure to comply with Florida's procedural rules.[1] This Court, therefore, held this issue to be precluded from federal review as a matter of law. Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

Because this issue is precluded from federal review, none of the facts alleged by petitioner as to issue "a" would, even if proved, entitle petitioner to federal relief on this claim. Accordingly, petitioner's claim that issue "a" requires this Court to hold an evidentiary hearing is without merit. Furthermore, even if this issue were properly before the Court, in light of the lack of evidence proferred on this issue, no evidentiary hearing

is required, McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983), and the Petition for Rehearing will be denied as to this claim.

Issue "d":

Similarly, with respect to issue "d"--the Florida Supreme Court's alleged ex parte review of nonrecord materials in appeals of defendants sentenced to death--petitioner has alleged no facts which, if proved, would entitle him to relief. The petition for habeas corpus in this case was filed prior to the ruling of the Court of Appeals for the Eleventh Circuit in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983,), that effectively resolved the facts as to this issue. In Ford, the Eleventh Circuit held that, absent an allegation that the instant case was treated differently from all others, the Florida Supreme Court did not rely on non-record material in contravention of state law in those petitioners' cases which were before the Florida court in Brown v. Wainwright, 392

So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981). Ford v. Strickland, 696 F.2d at 811. Petitioner herein was a member of the class which brought the state habeas proceeding in Brown.

There has been no allegation that petitioner's case was treated any differently from the other petitioners in Brown. It is clear, therefore, that petitioner has alleged no facts which, if proved, would entitle him to federal relief. Accordingly, petitioner's claim that issue "d" requires this Court to hold an evidentiary hearing is without merit, and the petitioner will be denied as to this claim.

Issues "b" and "c"

Finally, petitioner argues that an evidentiary hearing is required on his federal habeas claims of ineffective assistance of trial and appellate counsel--issues "b" and "c" herein. Issue "b" charges petitioner's counsel with twenty-six counts of ineffective assistance of

trial counsel during both the guilt and sentencing phases of trial. Claim "c" alleges that petitioner's appellate counsel were ineffective in that they did not raise certain specified issues on direct appeal of the conviction. The Court considered these claims on their merits in ruling on the habeas petition.

Without so ruling, the Court will assume that some of these allegations would, if proved, entitle petitioner to the writ such that the first prerequisite to entitlement to a habeas hearing would be met. See Guice v. Fortenberry, 661 F.2d at 503. Furthermore, petitioner has alleged that "no hearing" was held on these allegations by the state court. If this were true, this Court would be required to hold an evidentiary hearing on these claims. Townsend v. Sain, 372 U.S. 293 (1963).

Petitioner's assertion that no evidentiary hearing on these issues was held, however, is not true. A hearing was held before the

Honorable John W. Booth in Sumter County Courthouse on September 30, 1982. The instant claims "b" and "c" were before Judge Booth at that time. Petitioner was given every opportunity to present any testimony he had that was relevant to these claims. He refused. See Exhibit "B" at 522-29, 536. On this record, the Court does not agree with petitioner that no evidentiary hearing was held on these issues and so holds.

The Court will, however, construe petitioner's position to be that the material facts were not adequately developed in the state court proceeding. If this allegation were true, then petitioner also might be due a federal evidentiary hearing. Townsend v. Sain, 372 U.S. at 311. The Supreme Court has clearly held that:

> [w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in

> a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Id. at 312-13 (footnote omitted).

A federal habeas petitioner must, however, make a showing of two elements in order to obtain an evidentiary hearing based on the assertion that material facts were not adequately developed at the state-court proceeding: first, that a fact pertaining to his federal constitutional claim was not adequately developed at the state-court hearing and that the fact was "material" or crucial to a fair, rounded development of the material facts; and, second, that failure to develop that material fact at the state's proceeding was not attributable to petitioner's inexcusable neglect or deliberate bypass. Townsend v. Sain, 372 U.S. at 317; Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983).

The Court notes initially that counsels' decisions concerning trial strategy are certainly facts material to the allegations herein of ineffective assistance of counsel. Washington v. Strickland, 693 F.2d 1243, 1254 (5th Cir. 1982) (Unit B en banc). Federal courts do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Petitioner herein, however, does not even allege that his counsels' actions were not the result of tactics or strategy.

Furthermore, the record in this case contains an admission by petitioner's present counsel that he chose not to question petitioner's trial counsel (who were also his appellate counsel) at the state-court proceeding for tactical reasons. Although both of petitioner's prior attorneys were present at the 3.850 hearing, his present counsel refused to

put them on the stand to elicit their testimony about their trial tactics and strategies. Exhibit "B" at 515-17. He stated for the record: "I choose to [not put on any testimony] as a matter of tactics at this time."[2] Exhibit "B" at 535-36.

This Court, therefore, held in its disposition of the habeas petition that, as a matter of law, petitioner deliberately bypassed his opportunity to present testimony at the state evidentiary hearing on these claims, and does now reaffirm that holding.[3] See Opinion and Order entered May 18, 1983, at 39-41. A state prisoner who knowingly and deliberately bypasses state procedures intentionally relinquishes known rights. Fay v. Noia, 372 U.S. 391, 438-39 (1963); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Thomas v. Zant, 697 F.2d at 981.

Furthermore, this Court does not agree with petitioner that to hold that he has waived his right to an evidentiary hearing on these

claims is to do a manifest injustice in this case. First, this Court does not agree that the relatively short time (two weeks) petitioner's counsel had within which to prepare the various pleadings and papers associated with the filing and presentation of petitioner's 3.850 motion before the state court necessarily means, as petitioner maintains, that the quality of the pleadings was inadequate to fairly present his arguments for reversal of his conviction. In fact, the motion, which is virtually identical to the federal habeas petition, is of unusually high quality.

Furthermore, the record shows that the 3.850 motion was over sixty pages long and raised and argued the facts and law as to some twenty-six claims, each with numerous subclaims. Petitioner's counsel had sufficient grasp of the record in this case that he was able to cite voluminous facts in support of each of these claims. For example, in support

of the claim of ineffective assistance of trial counsel, counsel cited twenty-six factual instances which he argued demonstrated the alleged ineffective assistance. The first of these instances--jury selection--was further supported by eleven specific factual examples of alleged ineffective assistance.

The record simply does not support the assertion that petitioner's 3.850 counsel was unacquainted with or unprepared to present petitioner's case at the state-court evidentiary hearing on the 3.850 motion. The record reveals that, contrary to his assertion in the instant petition, present counsel did indeed interview petitioner's trial counsel prior to the state-court hearing. Exhibit "B" at 478 - 79. With both of petitioner's trial counsel present at the hearing, petitioner's 3.850 counsel need only have put them on the stand and asked them to explain their failure to perform as he alleges they should have. His

tactical refusal to do so amounts to a waiver binding on petitioner. Thomas v. Zant, 697 F.2d at 982.

Secondly, petitioner's allegations of ineffective assistance of counsel are such that the Court was able to determine the merits of petitioner's allegations from the existing record. Where this is possible, an evidentiary hearing is not required. Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983); Dickson v. Wainwright, 683 F.2d 348 (11th Cir. 1982).

The "historical facts" as to what counsel did and did not do are profusely alleged in the habeas petition. The Court was provided with the complete record of all proceedings in this case. Petitioner himself represented to the state court that:

> With regard to the point that my allegations of ineffective assistance of counsel, . . . are all deemed waived because I won't call [trial counsel], ...

> I will state to the Court as an officer of the Court with regard to all of those allegations, each one that dos not say "upon information and belief" is in fact substantiated in the trial transcript of the trial and nothing more, no more testimony, need be put on, it only need be examined.

Exhibit "B" at 527. Review of the 3.850 motion (virtually identical to the habeas petition) reveals that only eight of the more than forty factual allegations therein were made upon information and belief.

Of the eight allegations petitioner asserts require an evidentiary hearing, the Court holds that none states a constitutional claim as a matter of law as not one establishes the requisite factual dispute to entitle petitioner to an evidentiary hearing. Dickson v. Wainwright, 683 F.2d at 351. The burden is on petitioner in this proceeding to allege sufficient facts to support the grant of a second evidentiary hearing on these issues. This Court need not "blindly accept speculative and

inconcrete claims" as the basis upon which a hearing is ordered. Schultz v. Wainwright, 701 F.2d at 901; Dickson v. Wainwright, 683 F.2d at 351; Baldwin v. Blackburn, 653 F.2d 942, 947 (5th Cir. 1981).

The Court concludes, therefore, that petitioner's assertion tha issues "b" and "c" require an evidentiary hearing in this case is without merit and the petition for rehearing will be denied as to these claims.

Accordingly, it is

ORDERED that the Petition for Rehearing, filed herein on May 26, 1983, is denied.

DONE AND ORDERED at Jacksonville, Florida, this 18 day of August 1983.

s/Susan H. Black
UNITED STATES DISTRICT JUDGE

Copies:

Counsel of Record

NOTES

[1] In the habeas petition, petitioner sought to establish ineffective assistance of counsel as the requisite cause to excuse his failure to abide by Florida's procedureal rules. Following Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir. 1983), this Court held that allegations of ineffective assistance of counsel are insufficient to constitute the requisite cause. Opinion and Order at 13-14.

[2] This admission obviates the need for a hearing on the threshold issue of whether petitioner's 3.850 counsel's failure to offer trial and appellate counsels' testimony, despite their presence in the courtroom, was due to excusable neglect or deliberate bypass. See Buckelew v. United States, 575 F.2d 515, 519 (5th Cir. 1978); Cf. Thomas v. Zant, 697 F.2d at 986-87; Guice v. Fortenberry, 661 F.2d at 507. The Court notes also that Judge Booth specifically found that petitioner had, as a matter of strategy, deliberately bypassed his opportunity to develop the material facts as to these claims, see Exhibit "B" at 603, and that this finding is of an historical fact in the case supported by the record to which this Court may defer. Thomas v. Zant, 697 F.2d at 980.

[3] The present ruling pertains to the petitioner's deliberate bypass of an evidentiary hearing before the state court. It is of interest to note that the review of the facts in the habeas case suggests that the petitioner has continued in conduct designed to delay and perpetuate his post-trial remedies. For example, after deliberately bypassing his opportunity to present testimony at the state-court evidentiary hearing, petitioner has in the

instant proceeding waited until May 17, 1983-almost eight months after the petition was filed and also after his expert had left the country--to request an evidentiary hearing on four specific issues. Furthermore, petitioner stated that his expert witness would be out of the country for a period of over six months and requested that an evidentiary hearing be deferred until such time as this expert returned. The petitioner's objective throughout this and previous proceedings seems to be calculated to maximize delay in disposition of this petition.

THE COURT: All right. Gentlemen, I would like to ask the Clerk to hand the State and the defendant a copy of a letter dated May 15, 1978. This letter is addressed to Mr. Oldham, the State Attorney, to Mr. Morton Aulls, to Mr. Dan Robuck, Mr. William H. Stone, Mr. James Ray Shaw, Mr. Michael T. Kovach, and Sheriff Malcolm McCall, then the Sheriff of Lake County, and is in reference to the joint trial which was held in Lake County wherein the defendant Hall and Ruffin were represented by Mr. Robuck, Mr. Aulls, and the defendant Ruffin was represented by Mr. Kovach and Mr. Stone.

In this letter to the attorneys a format for jury selection and a copy of a security precautions were enclosed. The format which was followed in the Hall/ Ruffin trial at Lake County was agreed to by the attorneys in the Lake County trial.

A modified format of jury selection was also prepared by the Court for the Hall trial, which was transferred from Lake County, having been, of course, originally here in Sumter County, then transferred to Putnam County. A format of jury selection was prepared by this Court and copies given to the attorneys, the trial attorneys, again. I ask that the Clerk give a copy of this format to each the State and the defendant.

The format for both trials; that is, the Hall/Ruffin trial in Lake County and the Hall trial in Putnam County followed was substantially the same except for one provision. Due to the physical layout of the courthouse in Putnam County, it was necessary for the defendant--it was impossible to bring the defendant into the courtroom as it was required that he be chained and handcuffed since he had just

recently attempted to escape from the Lake County Jail. In order to keep the prospectve jurors from viewing the defendant while handcuffed, the general qualifications of the prospective jurors were handled or was held or conducted in courtroom 305. While the general qualifications were being conducted, the defendant was escorted into Courtroom 302 and that is where the voir dire examination was held.

At this time I am going to take judicial notice of these two documents; that is, the letter dated May 15th, 1978, and also of the format of jury selection that was delievered to all the attorneys in the Lake County trial and also to the defense attorneys, Mr. Aulls and Mr. Robuck, in the Putnam County trial. I would ask at this time if there is any objection from the State or the defendant to the Court

taking judicial notice of these documents.5